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CASES REPORTED

IN THE

# Supreme Court of Appeals

OF

VIRGINIA

MARTIN PARKS BURKS, REPORTER

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VOL. CIX.

From December 3, 1908, to September 1, 1909

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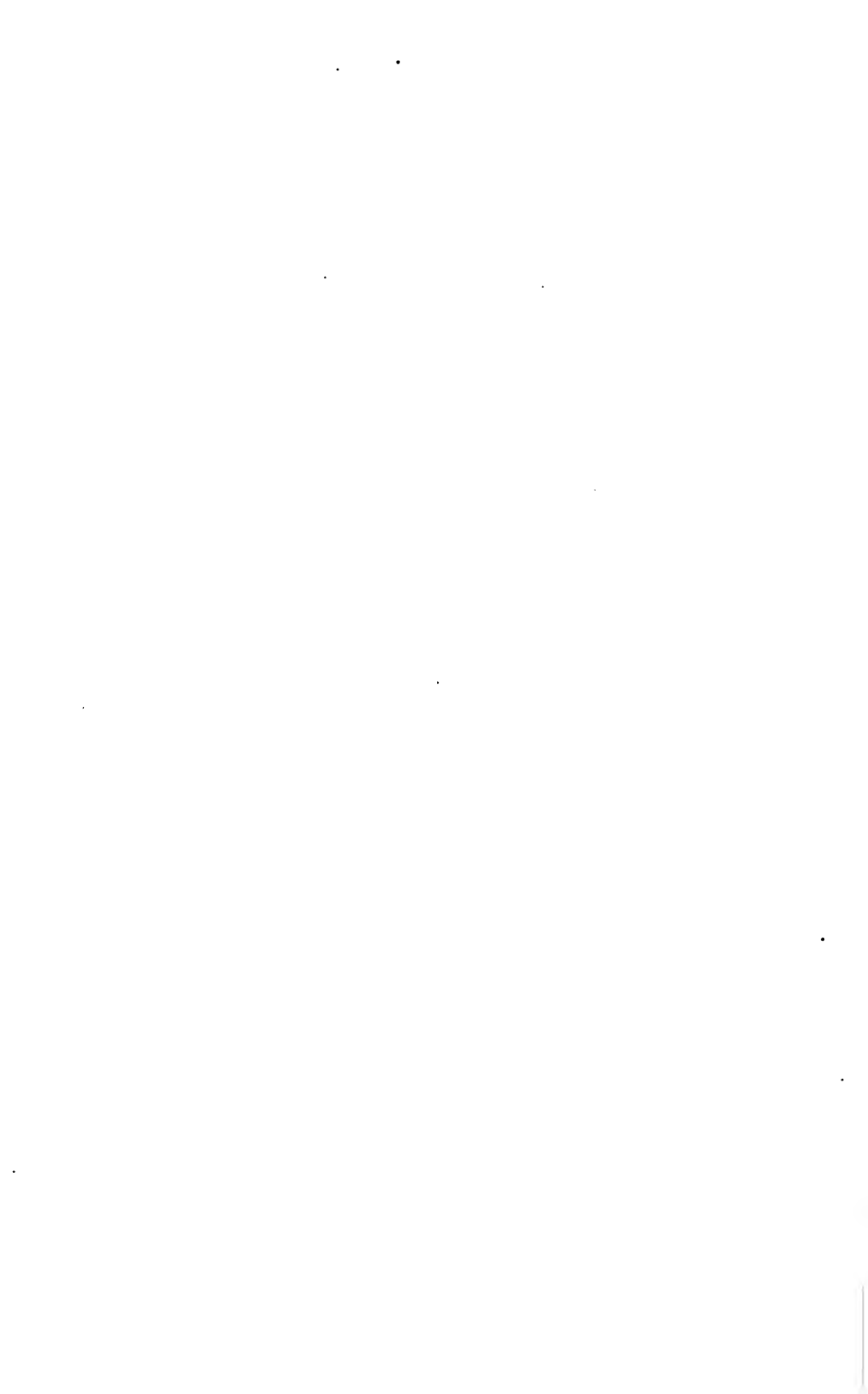
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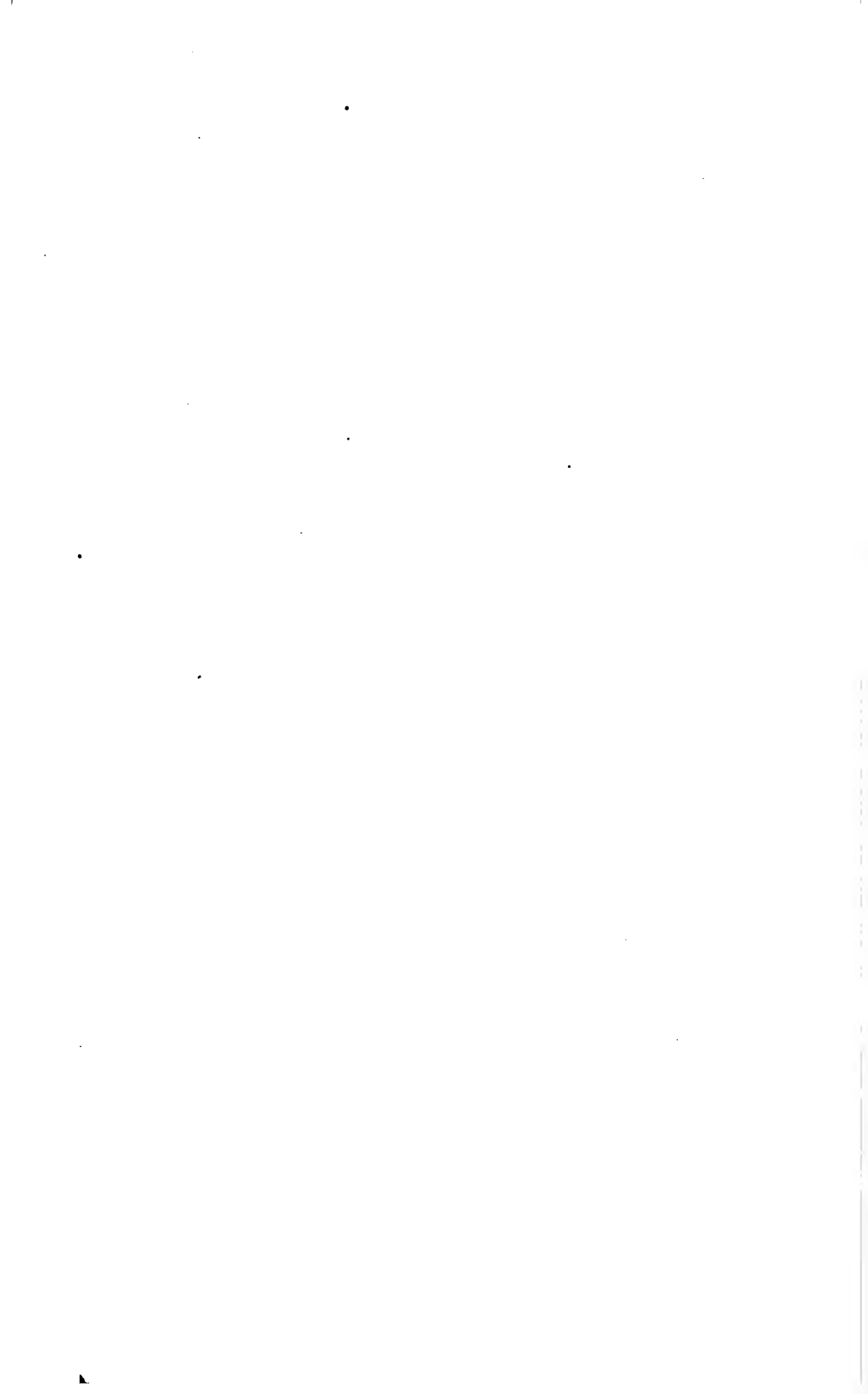
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CASES DECIDED  
IN THE  
Supreme Court of Appeals  
OF VIRGINIA.

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**Richmond.**

ADAMS EXPRESS CO. V. CHARLOTTESVILLE WOOLEN MILLS.

December 3, 1908.

1. CONSTITUTIONAL LAW—*Presumption—Statutes Susceptible of Two Constructions.*—Every statute is presumed to be constitutional, and cannot be declared to be otherwise unless it is made clearly so to appear. If a statute is susceptible of two constructions, one of which is plainly within, and the other plainly without, the legislative power, the courts must adopt the former.
2. CONSTITUTIONAL LAW—*Interstate Commerce Act—Reduction of Rates by False Billing—Virginia Act Constitutional—Code 1904, Sec. 1294c.*—Clause ten of section 1294c of Code of 1904 regulating common carriers is modeled after the Interstate Commerce Act, and is practically identical with its provision on the same subject, except that the penalty for its violation is less drastic. Each forbids, under penalty, false billing, weighing, classifying, and the like, of goods offered for shipment, and thereby obtaining transportation at less than the regular rates. The Virginia statute, therefore, is not unconstitutional, because in conflict with the Federal act.
3. APPEAL AND ERROR—*Constitutional Question—Limit of Jurisdiction.*—The constitutional question upon which the jurisdiction of this court solely depends not being sustained, this court is without jurisdiction to pass on the merits of the case.

Error to a judgment of the Corporation Court of the city of Charlottesville in an action of assumpsit. Judgment for the plaintiff. Defendant assigns error.

*Affirmed.*

The opinion states the case.



## Opinion.

*Wyndham R. Meredith and Harmon & Walsh*, for the plaintiff in error.

*Hanckel & Hanckel and Geo. E. Walker*, for the defendant in error.

HARRISON, J., delivered the opinion of the court.

This action was brought to recover damages for the loss of two bales of woolen goods shipped by the defendant in error at Charlottesville, Virginia, to certain consignees in New York city.

Upon the trial, a jury was waived, and the whole question of law and fact was submitted to the court. Upon due consideration the court gave judgment for the defendant in error. This judgment we are now asked to review and reverse.

It is properly conceded that, so far as the pecuniary amount involved is concerned, this court is without jurisdiction; but it is contended that the action rests upon a Virginia statute which is in conflict with the act of Congress known as the Interstate Commerce Act (act February 4, 1887, c. 104, 24 Stat. 379, U. S. Compiled St. 1901, p. 3154), and that this repugnance renders the Virginia statute unconstitutional and void.

The evidence shows that the Charlottesville Woolen Mills is a large shipper over the Adams Express Company's line. On November 1, 1906, the Woolen Mills delivered to the Express Company one bale of woolens, consigned to Ridabock & Co., New York, and took the usual receipt, the express charges fixed by the agent of the Express Company being \$1.50, which were to be paid by the consignee on delivery of the goods. No value was placed on this shipment, nor was anything said about it. Again on November 30, 1906, the Woolen Mills delivered to the Express Company a package of goods consigned to Browning, King & Co., New York, and took the usual receipt,

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the express charges fixed by the agent being \$1.00, which was paid by the Woolen Mills. No value was placed upon this package, nor was anything said about it. This appears to have been the course of dealing between the parties—the Woolen Mills filling up the receipts or bills of lading for which shipments were made.

It is admitted by the express company that both these packages of goods were lost. The rate charged for these shipments was reckoned upon the basis of \$50.00 as their value. It appears that the value of one was \$190.05, and of the other \$83.19; and that if they had been shipped at their true value the rate would have been greater than was charged. It is, therefore, insisted that the Woolen Mills, by its failure to state the value of the goods, has knowingly and wilfully, by false billing, and false representation, obtained transportation for its property at less than the regular rate, thereby rendering the contract sued on unenforceable by reason of the plaintiff having made itself amenable to the following provision of section ten of the Interstate Commerce Act:

*“Any person and any officer or agent of any corporation or company who shall deliver property for transportation to any common carrier, subject to the provisions of this act, or for whom as consignor or consignee any such carrier shall transport property, who shall knowingly and wilfully, by false billing, false representation of the contents of the package, or false report or weight, or by any other device or means, whether with or without the consent or connivance of the carrier, its agent or agents, obtain transportation for such property at less than the regular rates then established and in force on the line of transportation, shall be deemed guilty of fraud, which is hereby declared to be a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was committed, be subject for each offense to a fine of not exceeding five thousand dollars or imprisonment in the penitentiary for*

## Opinion.

*a term of not exceeding two years, or both, in the discretion of the court."*

In order to give this court jurisdiction it is contended that clause ten of section 1294c of the Virginia statute regulating common carriers is in conflict with the foregoing provision of the act to regulate commerce.

The clause of the Virginia statute referred to provides as follows:

*"Any person, or any officer of any corporation or company, who shall deliver property for transportation to any transportation company, or for whom as consignor or consignee any such transportation company or line shall transport property, who shall knowingly and wilfully, by false billing, false classification, false weighing, false representation of the contents of the package, or false report of weight, or by any other fraudulent device or means, whether with or without the consent or connivance of the carrier, its agent or agents, obtain transportation for such property at less than the regular rates then established and in force on the line of transportation, shall be fined not less than one hundred dollars nor more than five hundred dollars for each offense."*

This Virginia statute was enacted years after the act of Congress regulating commerce, and an examination of the two provisions in question shows that the Virginia legislature intended and was endeavoring to model its enactment for the regulation of common carriers upon the Federal law. While the language of the two provisions here contrasted is not in all respects exactly the same, it is substantially so. The terms of the two provisions are practically identical, except that the punishment declared by the Federal statute for a violation of the law is more drastic than that imposed by the State enactment.

We can declare an act of the General Assembly void only when such act is so clearly and plainly unconstitutional as to leave no doubt or hesitation on our minds. Upon the most familiar principles, repeatedly declared by the decisions of the

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Opinion.

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Supreme Court of the United States, and of the supreme courts of all the States, and by none more emphatically than by this court, every statute is presumed to be constitutional. It cannot be declared by the courts to be otherwise unless it is made clearly so to appear. *Button v. State Corporation Commission*, 105 Va. 637, 54 S. E. 769; *Virginia-Tenn. C. & I. Co. v. McClelland*, 98 Va. 424, 36 S. E. 479.

Further, it is a recognized canon of construction, that when a statute is susceptible of two constructions, one of which is plainly within and the other plainly without the legislative power, the courts must adopt the former construction. *Harri-son v. Thomas*, 103 Va. 333, 49 S. E. 485.

In the light of these authorities and the well settled principles they illustrate, we cannot hold the Virginia act to be unconstitutional and void because in conflict with the provisions of the Federal law here invoked.

Section 88 of the Virginia Constitution provides, that in no case where the jurisdiction of the court depends solely upon the fact that the constitutionality of a law is involved shall the court decide the case upon its merits, unless the contention of the appellant upon the constitutional question be sustained. The constitutional question, upon which our jurisdiction solely depends, not being sustained, we are without jurisdiction to pass upon the merits of the case, and must not be understood as intimating an opinion upon any question raised by the record, other than the constitutional question..

The judgment must, therefore, stand affirmed.

*Affirmed.*

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Syllabus.

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**Richmond.**

COUK &amp; DUNCAN v. SKEEN, JUDGE.

December 3, 1908.

1. CONSTITUTIONAL LAW—*Statutes—Emergency—Dispensing with Reading—Sections 50 and 53 of Constitution.*—The emergency which makes it necessary for a law to *take effect* sooner than ninety days after the adjournment of the legislature is entirely different from the emergency which must exist in order to dispense with *reading the bill* on three different calendar days in each house. The first is provided for by section 53 of the Constitution, and by its express terms the emergency must be expressed in the body of the bill. The second is provided for by section 50 of the Constitution, and the emergency need not be expressed in the bill. This is also the legislative construction of these constitutional provisions.
2. CONSTITUTIONAL LAW—*Sufficiency of Title of Statute.*—If the subjects embraced in an act, but not specified in the title, have congruity or natural connection with the subject stated in the title, or are cognate and germane thereto, the requirement of the Constitution that “no law shall embrace more than one subject, which shall be expressed in its title.” is satisfied.
3. CONSTITUTIONAL LAW—*Title of Statute*—“Court-house”—“County Seat.”—The word “court-house” is used in this State as synonymous with “county seat,” and the title of the act which uses one term is sufficient to cover the body of an act using the other.
4. CONSTITUTIONAL LAW—*Sinking Fund for County Bonds—Section 187 of Constitution Applicable to State Only.*—Section 187 of the Constitution of this State providing that “every law hereafter enacted by the General Assembly creating a debt or authorizing a loan shall provide for the creation and maintenance of a sinking fund for the payment and redemption of the same” refers only to a debt contracted by, or a loan made to, the State, and not to bonds issued by a county for the purpose of erecting a court-house. Moreover, section 834d of the Code of 1904 enacted prior to the act called in question in this controversy, and *in pari materia*, authorizing the boards of supervisors of the several counties, under certain conditions, to borrow money and issue

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bonds therefor whenever necessary to build a court-house, provides that when the bonds of a county are so issued, the board of supervisors shall levy a tax sufficient to pay the interest thereon and create a sinking fund to pay the principal at or before maturity.

Original application for a writ of prohibition.

*Writ Denied.*

The opinion states the case.

*R. L. Pennington, C. F. Duncan, B. H. Sewell, James W. Orr and Irvine & Morison*, for the petitioners.

*R. E. L. Chumbley, J. C. Noell and Bullitt & Kelly*, for the respondent.

CARDWELL, J., delivered the opinion of the court.

The object of this proceeding is to prohibit the respondent, as judge of the Circuit Court of Lee county, from issuing any order calling a special election in the county of Lee on the question of the removal of the court-house of said county from Jonesville to Pennington Gap, in said county, pursuant to the prayer of certain petitions presented to the respondent, as authorized by the act of the General Assembly approved March 14, 1908 (Acts 1908, p. 594), entitled, "An act to provide for submitting the question of the removal of the court-house of any county to the qualified voters of such county, and in the event such removal is voted, to authorize the board of supervisors to acquire necessary land and erect buildings."

Section 50 of the Constitution, with respect to the enactment of laws, requires, *inter alia*, that every bill shall be read at length on three different calendar days in each house, etc., but this requirement may be dispensed with, "*in any case of emergency by a vote of four-fifths of the members voting in each house taken by the yeas and nays, the names of the members*

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*voting for and against* entered on the journal"; and section 53 of the Constitution, relating to the "time when laws take effect," is as follows: "No law, except a general appropriation law, shall take effect until at least ninety days after the adjournment of the session of the General Assembly at which it is enacted, unless in case of an emergency (which emergency shall be expressed in the body of the bill), the General Assembly shall otherwise direct by a vote of four-fifths of the members voting in each house, such vote to be taken by the yeas and nays, and the names of the members voting for and against entered on the journal."

The act of the legislature, *supra*, was plainly intended to meet by a general law the requirement of section 63 of the Constitution, that "the General Assembly shall not enact any local, special or private law" in certain named cases, among which is "changing or locating county seats."

The first ground upon which petitioners rely is that the act is unconstitutional in that it did not pass the Senate in the manner required by section 50 of the Constitution. To sustain this contention the Senate Journal for the session of 1908 is vouched, and it there appears in the recorded proceedings of March 6, 1908, that the bill in question—House Bill No. 88—came before the Senate on its second reading, and that on motion to dispense with the reading of the bill, as required by section 50 of the Constitution, the Senate being of opinion that an emergency existed, the required reading was dispensed with by the vote of 21 ayes to 2 noes; and that on a further motion the bill was then passed by its title, the vote being 28 ayes and 4 noes.

The exact point urged by petitioners is that this was not an emergency bill, and it was not, therefore, competent for the Senate to suspend the reading of the bill as required by section 50 of the Constitution; in other words, that as the act, which was enrolled and signed by the presiding officers of the two houses and approved by the Governor, does not declare an

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emergency in the body of the act, it was not constitutionally enacted and is void. This contention is rested upon the provisions of section 53 of the Constitution, *supra*.

Section 53 relates to the time when a law shall take effect, and it is therein provided that no law, except a general appropriation law, shall take effect until at least ninety days after the adjournment of the General Assembly, unless in case of emergency, which emergency shall be expressed in the body of the bill. Clearly the emergency therein indicated is not the kind of emergency referred to in section 50, and could not have reference to the class of bills to which belongs the one here contested. An emergency which makes it necessary for a law to take effect sooner than ninety days after the adjournment of the General Assembly, and which emergency must be expressed in the body of the bill, is a very different kind of an emergency from that referred to in section 50. There might be quite a number of emergencies which might arise, making it necessary to dispense with the reading of the bill on three different calendar days, although there was no need whatever for the act when passed to take effect sooner than ninety days after the adjournment of the General Assembly. Again, there might be a number of bills on the calendar of one or both houses at the approaching end of the legislative session, the passage of which was absolutely essential to the welfare of the State, but if they had to be read on three different calendar days could not be passed.

The legislature of the State has full power to legislate on any subject and to adopt its own rules, regulations and methods of enacting such legislation, unless prohibited by the Constitution; and the fact that the Constitutional Convention expressly declared that the kind of an emergency which might make it necessary for a bill to take effect sooner than ninety days after the adjournment of the General Assembly should be expressed in the body of the bill, and did not require that the kind of an emergency referred to in section 50 should be so expressed,



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very clearly indicates that it was not the intention of the convention to require that the latter kind of an emergency should be so set forth or declared. It is not claimed that this is expressly required, and there is no reason whatever to resort to implication.

To require such an emergency as is referred to in section 50 to be expressed in the body of the bill might defeat the very purpose of that section altogether. Where it is necessary for an act to take effect sooner than ninety days after the adjournment of the General Assembly, this can be foreseen at the time the bill is drafted, and there would be no hardship in requiring the fact to be set forth in the body of the bill; but the kind of an emergency referred to in section 50 cannot be seen until it arises, and then to insert it in the bill (which could only be done by amendment) would require the bill to be sent back to the other house for adoption or rejection, and in many cases would result in a failure to pass the bill.

The right of the public is safeguarded by the requirement of section 50, that in case of an emergency, such as there referred to, the reading of the bill on three different calendar days may be dispensed with only by a vote of four-fifths of the members voting taken by the yeas and nays, and the names of the members voting for and against entered on the journal.

The construction of section 50 that we have indicated is the same that the legislature has itself given it. The journals of both the Senate and the House show that a great number of bills have been passed since the adoption of the present Constitution in the same manner that the bill here in question was passed by the Senate, and in none of them that we have been able to examine is such an emergency as is referred to in section 50 of the Constitution expressed in the body of the act, while in all designed to take effect sooner than ninety days after the adjournment of the General Assembly the emergency is expressed in the body of the act.

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The next ground relied on by petitioners is that the act in question violates section 52 of the Constitution, which provides that no law shall embrace more than one subject, which shall be expressed in its title.

Section 52 of the present Constitution is identical with section 15 of the former Constitution, and in the case of *Ingles v. Straus*, 91 Va. 209, 21 S. E. 490, practically the same question here presented was considered and determined. It was there held that if the subjects embraced in the act, but not specified in the title, have congruity or natural connection with the subject stated in the title, or are cognate or germane thereto, the requirement of the Constitution, that "no law shall embrace more than one subject, which shall be expressed in its title," is satisfied.

We deem it only necessary to say that we are of opinion that the case cited controls this case upon the point under consideration.

It is further contended that the act in question is unconstitutional because its title is for taking a vote on the question of the removal of the *court-house* and not the *county seat*; in other words, that *court-house* means one thing and *county seat* another.

In Virginia, as in some of the other States, the two terms are used as synonymous. Says Webster's International Dictionary, "The word *court-house* in Virginia is used as synonymous with *county seat*." See also *Shanewerk v. Hoberecht*, 117 Mo. 22, 22 S. W. 949, 38 Am. St. Rep. 631; 2 Words and Phrases, 1683.

The title to the act assailed on constitutional grounds in *Ingles v. Straus*, *supra*, as in this case, used the term *court-house* alone and not *county seat*, and there, as here, throughout the body of the act, the legislature sometimes used the term *court-house* and sometimes the term *county seat*, and clearly used them as having the same meaning. It is true that in that

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case the question here under consideration was not raised, and doubtless the learned and astute counsel seeking to have the act in the former case declared unconstitutional took the view that as a matter of common knowledge the term court-house, in *Virginia*, is used as synonymous with county seat.

The remaining contention in this case is that the act in question is unconstitutional because it "gives authority to the board of supervisors to create a debt and to obtain a loan by issuing county bonds, and yet it does not provide any way whatever for the creation and maintenance of a sinking fund for the payment and redemption of the same."

Section 187 of the Constitution does provide, that "Every law hereafter enacted by the General Assembly creating a debt or authorizing a loan shall provide for the creation and maintenance of a sinking fund for the payment and redemption of the same"; but plainly that provision refers only to a debt contracted by the State, or to a loan made to the State, and is not at all applicable to a case like this where the statute merely provides that if a majority of the freeholders of a county voting on the question be in favor of a change of the location of their court-house, and if the land needed shall not be donated and the fund offered be not sufficient to acquire the land and erect the necessary buildings, or if the land shall be donated and the fund offered be not sufficient for the purpose, the board of supervisors shall have authority to issue the bonds of the county, etc., etc. Moreover, section 834d of the Code of 1904, enacted prior to the act here in question and *in pari materia*, authorizing the boards of supervisors of the several counties, under certain conditions and wherever necessary, to erect a court-house, clerk's office, or jail, etc., to borrow money and to issue bonds therefor, provides that when the bonds of a county are so issued, "the board of supervisors shall levy upon all property and lawful subjects of taxation for State purposes in said county a sum and tax sufficient to pay the interest on

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said bonds, and in such manner as they may deem best create a sinking fund sufficient to pay the said bonds at or before maturity."

We are of opinion that upon none of the grounds relied on by petitioners in this case should the writ of prohibition prayed be awarded, and it is, therefore, denied.

*Writ Denied.*

## Syllabus.

**Richmond.****NASH AND OTHERS V. YELLOW POPLAR LUMBER CO.  
AND OTHERS.**

December 3, 1908.

Absent, Cardwell, J.

1. **DEEDS—Delivery—Case in Judgment.**—As to one of the appellants, the evidence in this cause shows that if the deed from his father under which he claims an interest in the land in controversy was ever delivered, he reconveyed any and all interest he had in the land to his father two years before the father conveyed the land to one under whom the appellee claims title, and that this latter deed was delivered to the father. The said appellant so testified three years after the date of his deed to his father, and his conduct after the date of that deed is consistent with his testimony, and inconsistent with his present claim to an interest in the land.
2. **WITNESSES—Impeachment—Admissions—Former Testimony.**—If a party to a suit testifies that he acquired his interest in the land in controversy in the suit by a deed from his father, and that he reconveyed the interest to his father, but delivered the deed to a third person in escrow, and that the latter delivered the deed to the father without the performance of the condition on which it was delivered, a former deposition given by such party in a suit between third persons touching the same land, in which he stated that the deed to him from his father was never delivered, and so never became operative and that he executed the reconveyance for the purpose of setting at rest any question that might arise by reason of the existence of the deed to him from his father, is admissible in evidence as an admission against his interest, and also for the purpose of discrediting him as a witness.
3. **ESTOPPEL—Conduct of Party—Case in Judgment.**—In 1869 a father conveyed his undivided half-interest in a boundary of land to his four children in consideration of love and affection. In a

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suit to partition the land in 1886 a purchaser from one of the children claimed a fourth interest in the father's moiety. In that suit one of the sons who now claims a fourth interest in said moiety, and is one of the appellants in this cause, testified that the deed of 1869, under which he now claims, never became operative, that he took nothing under it, and that the interest which it purported to convey still belonged to his father. About two years thereafter the father sold and conveyed a moiety of the boundary to one under whom the appellees now claim. In 1906 the present suit for partition of said boundary was brought by the said son and his brother. The evidence shows that the said son was present aiding his father in making the sale above mentioned, that he saw one-half or more of the purchase money paid to his father without objection—without asserting title to or claiming interest in the land—and that the purchaser thereof did not know of the claim which he is asserting in this suit, and did not have any convenient means of acquiring such knowledge.

*Held:* Under this state of facts it is clear that the said son is not entitled to the relief sought.

Appeal from a decree of the Circuit Court of Tazewell county. Decree for defendants. Complainants appeal.

*Affirmed.*

The opinion states the case.

*C. H. Smithdeal* and *S. M. B. Coulling*, for the appellants.

*Vicars & Peery*, *C. C. Burns* and *E. S. Finney*, for the appellees.

BUCHANAN, J., delivered the opinion of the court.

This suit was instituted by the appellants, Fullen Nash and William Nash, for the partition of a tract of land containing 8,525 acres, known as the Nash and Hendrick's grant, in which they claimed they were the owners in fee of an one-eighth interest each.

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Their right to have partition was denied by the appellees, the defendants in the trial court, upon the following grounds:

1st. That the conveyance by which the complainants claimed to derive title from their father, Samuel H. Nash, was never delivered, and, therefore, they acquired no rights under it and never had any interest in the land.

2nd. That if the deed ever was delivered, the defendants were *bona fide* purchasers for value without notice.

3rd. That they were estopped by their conduct from asserting title to the land claimed as against the defendants.

4th. That they had been guilty of laches in asserting their claim.

5th. That they had lost their title to the land, if they ever had title, by the adversary possession of the defendants; and

6th. That Fullen Nash, one of the appellants, had reconveyed any interest which he may have had in the land to his father prior to the latter's sale and conveyance to the parties under whom the defendants claim.

In the view we take of the case, it is unnecessary to consider any of the said grounds of defense except the third and sixth, which were sustained by the trial court.

The first question we shall consider is whether or not Fullen Nash had, prior to the institution of this suit, parted with all interest which he may have had at any time in the Nash and Hendricks grant. If he had, it will be unnecessary to consider the question of estoppel, so far as he is concerned.

It appears that on the 8th day of June, 1869, Samuel H. Nash signed and acknowledged a deed, by which he conveyed, if the deed was delivered, his entire interest, being one-half, in the Nash and Hendricks grant to four of his children, among whom were the appellants, in consideration of natural love and affection. On the 24th day of July, 1883, Fullen Nash signed and acknowledged a deed, by which, if delivered, he reconveyed, in consideration of love and affection the interest which he had acquired from his father by the deed of June 8.

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1869. On the 5th day of May, 1888, Samuel H. Nash, the father, executed, acknowledged and delivered a deed to Simmons, Stratton and Gilliam, under whom the appellees claim, conveying or attempting to convey to them an undivided one-half interest in the Nash and Hendricks grant of 8,525 acres. Among the title papers delivered to his grantees was the deed of Fullen Nash to him of July 24, 1883.

When Fullen Nash testified in this case, he stated that the deed of July 24, 1883, which was filed as an exhibit with the answer of one of the defendants, was executed by him when he was contemplating going to the State of Missouri, and placed in the hands of Capt. H. H. Dickenson, clerk of the County Court of Russell county, as an escrow, to be delivered to the witness' father in the event the latter sold the Nash half of the Nash and Hendricks grant and the witness' share of the proceeds of the sale was sent to him by Capt. Dickenson; that as no sale was then made by his father, the conditions upon which the deed was to be delivered never happened, there never was a delivery of it, and his interest in the land did not, therefore, pass by it.

In the year 1886, there was pending in the Circuit Court for Russell county a suit under the style of *Hendricks and others v. Kernan and others*, in which it was sought, among other things, to have a partition of the Nash and Hendricks' grant. In that suit one Whitley Thomas filed his petition, claiming that he was the owner of an interest in that grant, purchased from Elizabeth Dye, a daughter of Samuel H. Nash, to whom it had been conveyed by her father by the said deed of June 8, 1869. In the controversy which grew out of the filing of that petition, Samuel H. Nash denied that the deed of June 8, 1869, had ever been delivered. His own deposition and the depositions of the appellants were taken by him in that case to prove that fact.

Fullen Nash testified, among other things, that although the deed of June 8, 1869, had never been delivered, his father, who wished to sell the Nash half of the Nash and Hendricks' grant,



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thought that that deed might interfere with the sale which he wished to make, and asked the witness, who was thinking of going to the State of Missouri, to reconvey to his father the interest which that deed purported to pass to the witness, and that he did so. In that deposition Fullen Nash does not pretend that the deed was placed in the hands of Capt. Dickenson as an escrow, to be delivered in the event his father sold the land and sent him through Capt. Dickenson his share of the proceeds of sale; but it is clear from his testimony in that case that he did not claim that he took any interest in the land under the deed of June 8, 1869, because it had never been delivered, but that in order to obviate any difficulty which his father might have in selling the land on account of that deed, he had made the reconveyance of July 24, 1883.

Fullen Nash's depositions in that case and in this upon the execution and delivery of that conveyance are utterly irreconcilable. His conduct, subsequent to the execution of that deed and until shortly before the institution of this suit, more than twenty years afterwards, is in harmony with his first deposition, taken only three years after the deed of July 24, 1883, was executed—that he never had any interest in the land, and, if he had, he had parted with it by that deed.

By some means, whether properly or not, the deed of June 8, 1869, had been recorded in the clerk's office of the County Court of Buchanan county. The records of that office were partially destroyed by fire in the year 1882, and entirely destroyed by fire in the year 1885, yet Fullen Nash, who now claims an one-eighth in a tract of more than eight thousand acres of land, did not have a copy of that deed put on record in that office, as he had the right to do, until the year 1906; never paid any attention to the land, or exercised any acts of ownership over it, or paid any taxes thereon, at least after the date of the deed of July 24, 1883.

There is evidence tending strongly to prove that Fullen Nash was present aiding his father when the latter made sale of the

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Nash half of the Nash and Hendricks' grant to the parties under whom the appellees claim.

The conduct of Fullen Nash, after the execution of the deed of July 24, 1883, until a short time before the institution of this suit, cannot be explained or accounted for upon any other theory, than that by that conveyance he intended to convey and did convey to his father any and all interest he may at that time have had in the land. When to this is added his sworn statement, made three years afterwards, that said deed was executed for that purpose, there can be no reasonable doubt that that deed was delivered to his father, and that he has no interest in the land sought to be partitioned.

It is claimed that his deposition, taken in the case of *Hendricks, &c. v. Kernan, &c.*, was not admissible evidence; but this contention is without merit. His statement in that deposition was an admission against his interest, and upon that ground was clearly admissible. It was also admissible for the purpose of discrediting him as a witness in this case, in which he had testified differently as to the delivery of the deed of July 24, 1883.

The remaining question to be considered is whether or not the appellant, William Nash, is estopped by his conduct from asserting title to the land in controversy. This defense the appellants insist cannot be relied on, because not put in issue by the pleadings.

While the allegations in the answers of the defendants, intended to raise this question, might have been more direct and specific, the facts alleged in the answers are sufficient and sufficiently pleaded to make out a case of estoppel, if satisfactorily proved.

Simmons, one of the vendees in the deed of May 5, 1888, testified positively that William Nash was present, participating in the negotiations, when that conveyance was made; that he did not claim any interest in the land conveyed, but on the contrary represented that his father's title to it was good, and

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saw a large part, more than half, of the purchase price paid to his father. Simmons further testified that he knew nothing about the deed of June 8, 1869.

Joseph Hibbits, the then clerk of the County Court of Buchanan county, a wholly disinterested witness so far as the record shows, testified positively that William Nash was present at that time and seemed to be assisting his father in the transaction. It is true that William Nash testifies that he was not present on that occasion, and denies that he ever knew of the sale in question until a year or so before the institution of this suit. This latter statement is incredible, and makes it difficult, if not impossible to give credit to his other statements when in conflict with the testimony of other witnesses. His father with whom he lived died less than a year after the sale, leaving a will. William Nash was one of the devisees named in the will, and admits that he heard it read. It disposes of the residue (\$5,500) of the unpaid purchase price due from the parties to whom his father had sold the land.

His conduct proves that he knew of the sale long before he says he did. It does not appear that after his father's sale and conveyance of the land, in the year 1888, until the deed of June 8, 1869, was re-recorded, in February, 1906, just before this suit was instituted, that he set up any claim to the land. During that long period he paid no taxes upon it, exercised no acts of ownership over it, and in the year 1890, when the general agent of his father's vendees or their successors was sent to William Nash to get information about the land, he was told by that agent whom he represented; that he was going to the land to take charge of it for his principals, the owners thereof, and wished to get such information from him as he could give about the land; yet William Nash made no claim to the land nor gave any intimation that he had or claimed any interest in it; but gave the agent such information as he could.

That William Nash claimed no interest in the land at the

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time his father sold it to the parties under whom the appellees claim is further shown by the fact that he testified in substance in the old case of *Hendricks v. Kernan*, hereinbefore referred to, that the deed of June 8, 1869, under which he now claims, never became operative; that he took nothing under it; and that the interest which it purported to convey still belonged to his father. This sworn statement was made in the year 1886, only about two years before the sale to the parties under whom appellees claim. During this period nothing is shown that could have changed his views as to his rights or interest in the land.

Without discussing further the evidence relied on by either side upon the question of estoppel, it is sufficient to say, that a careful consideration of the direct testimony, the facts and the circumstances disclosed by the record satisfies us that at the time his father conveyed the Nash moiety of the Nash and Hendricks tract of land to the parties under whom the appellees claim. William Nash was present aiding his father in making the sale; that he saw one-half or more of the purchase money paid to his father without objection—without asserting title to or claiming an interest in the land—and that the purchasers thereof did not know of the claim which he is asserting in this suit, and did not have any convenient means of acquiring such knowledge. Upon this state of facts it is clear that William Nash is not entitled to the relief sought.

We are of opinion that the bill was properly dismissed as to both complainants (appellants here) by the circuit court, and that the decree appealed from must be affirmed.

*Affirmed.*

Statement.

## Richmond.

ROBERT PORTNER BREWING CO. v. SOUTHERN EXPRESS CO.  
AND OTHERS.

December 3, 1908.

1. INTOXICATING LIQUORS—*Breweries—Shipments to No-License Territory—Private Consumers.*—Under the act of assembly approved March 12, 1908 (Acts 1908, p. 275), commonly known as the "Byrd Law," a manufacturer of malt liquors, whether such manufactory be situated in "licensed" or "no-license" territory, has no right to sell his product, to be delivered to a common carrier to be transported to a place where it cannot be legally sold. The private consumer living in "no-license" territory may buy in small quantities for personal use, but those engaged in the illegal sale of liquor cannot buy in large quantities from the manufacturers or wholesale dealers and use the common carriers as their aiders and abettors in their violation of the law. The general purpose of the law is to restrain and regulate the sale of liquor and, in furtherance of that purpose, to protect "no-license" territory from illegal traffic in liquor.

Appeal from the State Corporation Commission.

*Affirmed.*

The opinion states the case.

*Byrd & Brent* and *J. T. Lawless*, for the appellant.

*Thos. W. Shelton* and *Robt. C. Alston*, for Southern Express Co., appellee.

*Robertson & Wingfield*, *B. F. Buchanan* and *Wm. Hodges Mann*, for other appellees.

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BUCHANAN, J., delivered the opinion of the court.

The only question involved in this appeal is, whether or not, under the act of assembly approved March 12, 1908, found in chapter 189 of the Acts of 1908, pp. 275, 281-2, the manufacturer of malt liquors, where such manufactory is situated in "licensed" territory, has the right to sell his product, to be delivered to a common carrier to be transported to a place where it cannot be legally sold.

The State Corporation Commission, from whose order this appeal was granted, in deciding this question, delivered the following opinion, which is filed with and made a part of the record:

"The construction of the act approved March 12, 1908, known as the 'Byrd Law,' Acts 1908, page 275, is involved, and especially that part of section 15 (p. 282), which reads as follows:

"For the privilege of manufacturing malt liquors there shall be paid one hundred and fifty dollars, and upon payment of such specific sum the manufacturer shall have the privilege of selling the products of his brewing in quantities of two dozen pints or more at any place within the State of Virginia, except where such manufactory is situated in a no-license territory, in which case no sale shall be made and delivery had at the place of manufacture; but such manufacturer may sell the product of his brewing to be delivered to a common carrier to be transferred to any place where same may be legally sold; and the said manufacturer shall have the additional privilege of selling the products of his brewing in quantities not less than one gallon at the place of manufacture, except in no-license territory.'

"It must be conceded, and the petitioner does concede, that if the manufacturer of malt liquors is located in 'no-license' territory, he can only ship to places where liquor may be legally sold, but he contends that this prohibition does not apply to such a manufacturer who is located in 'license' territory.

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"It can certainly be said that there is no reason for such a discrimination between persons engaged in the same business, and if the language used is to be so construed, it should be clear that it was so intended.

"When considered fairly and without reference to the rest of the statute, its meaning is not perfectly clear. It is apparent that the general purpose of the law is to restrain and regulate the sale of liquor and in furtherance of that purpose to protect no-license territory from illegal traffic in liquor. This is evident because, while it allows the retailer to sell either spiritous or malt liquor in small quantities and does not in terms prohibit his delivering liquor in small quantities to common carriers, it is perfectly evident that its purpose is to prevent common carriers from transporting large quantities of liquor into no-license territory.

"It will be noted that by section 5 social club licenses are prohibited in no-license territory.

"By section 7 druggists who desire to sell ardent spirits are required to take out retail liquor license, except that they may use liquor in the preparation of medicine.

"Under section 12 sample merchants can only sell to some licensed person, club or corporation.

"Under section 14 manufacturers of wines and cider containing more than six per cent. of alcohol, are prohibited from selling in no-license or local option territory, and may not deliver to a common carrier, except to be transported to some place where ardent spirits may be legally sold.

"Under section 15 manufacturers of alcoholic liquors, as well as distillers of fruit brandy, are only permitted to deliver their product at the house where manufactured, or to a common carrier to be transported to a place where it may be legally sold.

"The double purpose, that is, allowing liquor in small quantities to be transported by common carriers only to be delivered to consumers for private use, and at the same time

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discouraging illegal traffic in liquor by prohibiting the transportation of large quantities by common carriers, is, we think, also sufficiently indicated by the provision above quoted with reference to the manufacture of malt liquor.

"The first two clauses fix the amount of the license tax, and discriminate between the manufacturer situated in no-license territory and the manufacturer located in license territory by providing, that if located in no-license territory no sale shall be made and delivery had at the place of manufacture.

"The next clause, and the one which gives rise to this controversy, separated by semi-colons from all the rest of the section, uses this language:

"'But such manufacturer may sell the product of his brewing to be delivered to a common carrier to be transferred to any place where same may be legally sold.'

"In order to sustain the contention of the petitioner, we must limit the meaning of the words 'such manufacturer' to a manufacturer located in no-license territory, and thus make a discrimination in favor of the manufacturer located in license territory, without any reason whatever for such discrimination, and in defiance of the general policy and purpose of the statute as a whole.

"This, however, is not the only language to indicate that such a construction would be erroneous, for the next clause reads:

"'And the said manufacturer shall have the additional privilege of selling the products of his brewing in quantities not less than one gallon at the place of manufacture, except in no-license territory.'

"Now, by every rule of reason, the words 'said manufacturer,' in the last clause, must mean the same as the words 'such manufacturer' in the clause immediately preceding, and the words 'said manufacturer' plainly and in express terms refer to both classes of manufacturers, whether located in license or in no-license territory.



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"The word 'manufacturer' is used only three times in the paragraph under consideration: In the first clause as 'the manufacturer'; in the third clause as 'such manufacturer'; and in the fourth clause as 'said manufacturer,' and we conclude that they mean any licensed manufacturer of malt liquors in the State, and that the only difference between the two classes of manufacturers intended by the statute is that the manufacturer located in license territory can sell and deliver not less than one gallon at the place of manufacture, while the manufacturer located in no-license territory can make no sale and delivery at the place of manufacture. We believe that this construction effectuates the apparent purpose of the legislature, and is in accordance with the avowed policy of the State to protect no-license territory from illegal traffic in liquor by discouraging its transportation in large quantities by the common carriers into such territory for such illegal sale.

"Under this construction the private consumer living in no-license territory may buy in small quantities for personal use, while those who are engaged in the illegal sale of liquor cannot buy in large quantities from the manufacturers or wholesale dealers and use the common carriers as their conscious or unconscious aiders and abettors in their violations of the law."

We are of opinion that the conclusion reached by the Corporation Commission as to the proper construction of the statute in question is clearly right; and as the reasons given in its opinion for reaching its conclusion are in accord with our views and are satisfactorily expressed, we adopt its opinion as our own, and will affirm the order appealed from.

*Affirmed.*

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Syllabus.

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**Richmond.****SOUTHERN EXPRESS CO. v. JACOBS.**

December 3, 1908.

1. **PLEADING—Failure to Take Rules—Correction by Court—Code, Section 3293.**—On a motion to remand a case to rules because the clerk had not taken the rules maturing the case for hearing, it is not error for the trial court to over-rule the motion, retain the case and require the clerk to enter the proper rules on the rule-book maturing the case for hearing; it appearing that the defendant was in no wise prejudiced by the failure of the clerk to take the rules at the proper time. Under the provisions of section 3293 of the Code, the court has control over all proceedings in the clerk's office during the preceding vacation.
2. **REMOVAL OF CASE TO FEDERAL COURT—Time for Filing Petition.**—A petition to remove a case from the State court to a Federal court must be filed on or before the rule-day on which a plea in abatement must be filed, else it will be too late; and under the provisions of section 3260 of the Code, all pleas in abatement must be filed before there is a conditional judgment at rules.
3. **CARRIERS—Damages to Stock—Evidence—Values Six Weeks After Injury.**—In an action to recover damages of a carrier for an injury received by a horse while in transit, a witness who saw the horse immediately before shipment and also six weeks thereafter may give his opinion as to the value of the horse at the latter date. The lapse of time affects the weight of the testimony, not its admissibility.
4. **EVIDENCE—Opinion of Witness—Qualification—Carriers—Damages to Stock.**—In an action against a carrier to recover damages for an injury inflicted on horses while in transit, a witness who has had large experience with horses, and who knew the particular horses for whose injury the action is brought, their temperament and characteristics, and who knew the kind of stalls in which they were shipped and is familiar with the effect of such confinement upon horses of that class, may give his opinion as to the effect of shipping horses a long distance in such stalls. This is

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not common knowledge of which the jury would be possessed independent of such evidence.

5. CARRIERS—*Shipment of Live Stock—Damage in Transit—Evidence of Value—Expenses of Shipper.*—If, in an action against a carrier to recover damages for injuries inflicted on horses in transit, the carrier proves the prices paid by the plaintiff for the horses, the plaintiff may, in rebuttal, show that, in addition to the price paid for the horses, he also incurred heavy expenses in training and developing the horses in order to obtain the price he expected to receive on the market for which they were purchased.
6. CARRIERS—*Injury to Goods in Transit—Place of Assessment—Measure—Connecting Carriers.*—Generally, the place of destination is to be taken as the basis for determining the damages to goods injured in transit; the measure being the difference between what the goods were worth at the place of destination, as injured, and what they would have been worth if delivered in good order. And this rule referring the measure of damages to the place of destination is applicable where goods are taken for transportation to a point beyond the initial carrier's line.
7. CARRIERS—*Injury to Goods in Transit—Connecting Carriers—Liability of Initial Carrier—Burden of Proof—Code, Section 12941.*—Where goods shipped on a through bill of lading to a point beyond the line of the initial carrier arrive at destination in an injured condition and the initial carrier is sued for the injury, the burden is upon him to show that the property was not injured on his line. Section 12941 of the Code (1904) declares that whenever property is received by a common carrier, loss or injury to it shall be *prima facie* evidence of the negligence of such carrier.

Error to a judgment of the Circuit Court of Warren county in an action of trespass on the case. Judgment for the plaintiff. Defendant assigns error.

*Affirmed.*

The opinion states the case.

*Downing & Weaver* and *Marshall McCormick*, for the plaintiff in error.

*Byrd & Forsythe*, for the defendant in error.

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HARRISON, J., delivered the opinion of the court.

The business of the defendant in error was to buy in Virginia a class of horses capable of development, and ship them to his stables near the city of New York, there to be trained and developed and resold at high prices. Under a contract with the plaintiff in error, a common carrier, he shipped by express a carload of horses from a station in Clarke county, Virginia, to Rye, N. Y., where his stables were located. This suit was brought to recover of the plaintiff in error damages for injuries alleged to have been sustained by this shipment of horses as a result of the negligence of the defendant company.

The line of the plaintiff in error only extended from the point of shipment in Clarke county to Hagerstown, Maryland, at which place the horses were delivered to a connecting carrier, and by that company transported to Rye, N. Y., the place of destination.

The circuit court held that the plaintiff in error was only liable for the damage sustained by the horses over its own line, and under this ruling a judgment was obtained for \$700, the damage shown to have been done to four of the horses before the express car reached Hagerstown, Md.

This judgment we are asked to review and reverse.

We are of opinion that the circuit court did not err in overruling the motion of the plaintiff in error to remand this case to rules. This motion was based upon the ground that there had been no record or entry by the clerk showing any proceedings at rules.

The writ was issued in the case, returnable to 1st of August rules, 1906. The declaration was duly filed as shown by the endorsement thereon. Immediately upon overruling the motion to remand, the court made an order directing the clerk to enter in the rule book at 1st of August rules, process executed, declaration filed, common order; and at 2nd August rules, common order confirmed, writ of inquiry.

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Section 3293 of the Code provides, that "The court shall have control over all proceedings in the office during the preceding vacation. It may reinstate any cause discontinued during such vacation, set aside any of the said proceedings, or correct any mistake therein, and make such order concerning the same as may be just."

This statute was ample authority for the court's action in overruling the motion to remand, and directing the clerk to make the proper entries in the rule book. In this case it is shown that the clerk was as ready to receive the pleadings of the defendant as he was to file the declaration of the plaintiff, but no plea of any kind was tendered by the defendant. It is not pretended that the defendant was misled by any misprison of the clerk, nor is it suggested that any opportunity to file pleas or make any defense was lost by reason of any action on the part of the clerk. It was the duty of the clerk to enter the rules properly as required by the statute. His failure to do so, however, could not, in this case, be prejudicial to the plaintiff who had done all that was required to entitle him to his office judgment. *Digges v. Dunn's Ex'or*, 1 Munf. p. 56; *Shelton v. Welch*, 7 Leigh, 175; *Shadrack v. Woolfolk*, 32 Gratt. 715.

We are further of opinion that there was no error in the refusal of the circuit court to permit the plaintiff in error to file its petition for a removal of the cause to the United States District Court.

It is conceded that such petitions must be filed on or before the rule day on which under the practice in this State a plea in abatement must be filed. Under our statute, section 3260 of the Code, all pleas of abatement must be filed before there is a conditional judgment at rules. The defendant not having presented his petition for removal of the case to the Federal court within the prescribed time, its right to make such application was lost. *Martin's Admr. v. B. & O. R. Co.*, 151 U. S. 673, 38 L. Ed. 311, 14 Sup. Ct. 533.

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The third assignment of error, that the court erred in refusing to dismiss the case, has been disposed of by what has been already said.

We are further of opinion that there was no error in the action of the court with respect to the testimony of the witness, Thompson Sowers.

The complaint is made that this witness was allowed to testify as to the condition of the horses six weeks after the date of the shipment. The witness stated that he had seen the horse in question immediately before its shipment and had seen it six weeks afterwards. The condition of the horse six weeks after the shipment was connected with the injury received and the witness was permitted to give his opinion of its value at that time. The length of time may have affected the weight of the testimony, but it did not affect its admissibility.

Complaint is also made that this witness was permitted to state what, in his judgment, would be the effect of shipping horses a long distance in such stalls as were furnished in this case. The witness was shown to have had large experience with horses. He knew their habits and was familiar with their requirements. He knew these particular horses, their temperament and characteristics, and he knew the kind of stalls in which they had been put and was familiar with the effect of such confinement upon the class of horses in question. The jury were not necessarily informed upon any of these subjects, and it was only by such testimony that they could be put in possession of the facts essential to the formation of a proper judgment in the premises.

Objection is made to the court's permitting the introduction of evidence as to the expense necessary to develop a horse for the New York market. The plaintiff in error had brought out the price which the defendant in error had paid for the horses, for the purpose of impressing upon the jury that the value of the horses was to be regulated by the price paid for them. The evidence objected to was proper to rebut this inference, by show-

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ing that in addition to the price paid for the horses he also incurred very heavy expense in training and development in order to obtain the price he expected to receive on the New York market.

Other objections to the admissibility of testimony involve the contention of the plaintiff in error, that the value of the horses was not to be ascertained at the point of destination, but at Hagerstown, the point at which the liability for the horses, on the part of the defendant company, ceased. The shipper contracted to pay a through express charge for the delivery of the horses at Rye, N. Y. Under that contract the defendant company only contracted, on its part, to carry the horses on its own lines as far as Hagerstown, but the horses were not consigned to Hagerstown or destined for that place. Under the express terms of the contract, it was a through shipment to Rye, N. Y., and the charges paid accordingly. Neither party to the contract contemplated that the horses would be sold in Hagerstown, where there was no market for such horses; or that their value would be fixed at that point or any other point through which they merely passed in their rapid transit to the northern destination agreed upon. While the liability of the plaintiff in error, according to the construction of the circuit court, for loss would end at Hagerstown, it was none the less its duty to trans-ship the property by other carriers to the point of destination agreed upon, which was Rye, N. Y.

The general rule is, that in case of injury to goods the place of destination is to be taken as the basis for determining the damages, the measure being the difference between what the goods were worth at the place of destination, as injured, and what they would have been worth if delivered in good order. And the rule referring the measure of damage to the place of destination is also applicable where goods are taken for transportation to a point beyond the initial carrier's line. 6 Cyc. p. 530.

Other minor objections are made to the admissibility of

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evidence in this case, but it is not necessary to discuss these in detail. It is sufficient to say that every such objection has been carefully considered and the conclusion reached that the plaintiff in error has not been prejudiced by the rulings complained of.

The 13th assignment of error is to the action of the court in instructing the jury, that if the property when it arrived at Rye, N. Y., was in an injured condition, the burden rested upon the defendant company to show that the property had not been injured upon its own line.

This instruction is in conformity with the ruling of this court in the case of *N. & W. Ry. Co. v. Wilkinson*, 106 Va. 775, 56 S. E. 808, where it is held that on proof of delay in delivery a *prima facie* case is made against the initial carrier, and the burden is on it to establish its own freedom from negligence. It is true that in the case cited it was a shipment of lumber; but the statute, section 12941 makes no distinction between classes of property; on the contrary, it declares in broad terms, that whenever any property is received by a common carrier, loss or injury to it shall be *prima facie* evidence of the negligence of such common carrier.

Other assignments of error with respect to the action of the court in giving and refusing instructions have been practically disposed of by what has been said in connection with the questions arising on the admissibility of evidence.

We are of opinion that the case was fairly submitted to the jury, and that their verdict cannot be disturbed upon the ground that it is contrary to the law and the evidence.

The judgment complained of is affirmed.

*Affirmed.*



Syllabus.

**Richmond.**

CAROLINA, CLINCHFIELD AND OHIO RAILWAY v. BOARD OF  
SUPERVISORS OF SCOTT COUNTY.

January 14, 1909.

1. **APPEAL AND ERROR—Mandamus—Adequate Remedy.**—The pendency of a writ of error to the ruling of a circuit court dismissing the appeal of a railroad company from the refusal of the board of supervisors of a county to act upon its petition asking the board's consent to a proposed alteration of a county road, is no bar to the prosecution of a writ of error to the ruling of said circuit court refusing to award to said railroad company a mandamus to compel the board to take action on said petition. The writ of error in the first case is neither an adequate nor a proper remedy.
2. **MANDAMUS—Function of Writ—Adequate Remedy.**—Mandamus will not lie in favor of a party who has another clear and adequate legal remedy, but the "adequate remedy" which will bar mandamus must be such as reaches the end intended, and actually compels the performance of the duty in question. It must be equally as convenient, beneficial and effective as the proceeding by mandamus. The function of the writ of mandamus is to enforce the performance of duties growing out of public relations, or imposed by statute, or in some respect involving a trust or official duty.
3. **RAILROADS—Change of County Road—Consent of Supervisors—Mandamus.**—Before a railroad or other public service corporation can alter a county road, it must first obtain the consent of the board or supervisors of the county to the proposed alteration, and, upon proper application, it is the duty of the board, in advance of the construction of the proposed railroad, to consent or refuse to consent to the proposed change of route, leaving the matter of construction, grade, etc., to be fixed upon and carried out afterwards. If application is made for such consent, and the board simply refuses to act, the proper remedy is mandamus to compel the board to take action by either giving or refusing its consent

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to the proposed alteration. This does not in any way interfere with the discretion of the board, but simply compels action generally. The board has no right to insist that the proposed new road shall be constructed before it will give or refuse consent to the proposed change.

Error to a judgment of the Circuit Court of Scott county refusing to award a mandamus in favor of the plaintiff in error against the defendant in error.

*Reversed.*

Error to a judgment of the Circuit Court of Scott county dismissing an appeal from the action of the board of supervisors of said county refusing to act upon a petition filed by the plaintiff in error.

*Dismissed.*

The opinion states the case.

*Phlegar & Powell, Irvine & Morison and H. G. Morison,* for the plaintiff in error.

*W. S. Cox and J. P. Corns,* for the defendant in error.

CARDWELL, J., delivered the opinion of the court.

The controversy in these cases, submitted together to this court for decision, is presented in two phases. Plaintiff in error is constructing a line of railroad, pursuant to its charter, through the county of Scott, a part of which, especially between Wood's post-office and the residence of one J. N. Cocke, has been located and will be constructed along the side of a high and steep ridge or mountain, a part of the way just north of and adjoining a county road, the conformation of the land being such that it is necessary to use the location named for the line of railroad. The county road is immediately on the north bank of Clinch river, and at places is below the high water mark, and

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in case of high water is at times impassable; the distance between the points mentioned, viz.: Wood's post-office and J. N. Cocke's residence, being about one mile, and there will be two railroad tracks, one to be used as the main line and the other as a siding for passing trains, and the railroad will at some points be above the present county road, at other points a little below, at others on the same level with it, and will necessarily cross the present county road at or near Wood's post-office and also at or near the residence of J. N. Cocke.

This situation in all of its details, together with maps showing the proposed route for a new road for use by the public in lieu of the present road, was presented to the board of supervisors of Scott county in a petition filed by the railroad company, praying that petitioner be permitted to alter the county road and locate it upon a well defined route, as shown by the maps filed, the proposed new road to be located and constructed wholly at the cost of the petitioner. But the board of supervisors refused to entertain the petition at all, on the ground that it had no jurisdiction to do so until the petitioner had actually constructed a new road and offered it to the county; in other words, the board of supervisors ruled that petitioner must acquire the right of way for a new county road, and incur the expense of constructing that road, before the board could ascertain whether it would consent or refuse to consent to the change of the location of the road at all, or if at all to the route adopted by the petitioner, and if the route was acceptable, whether it would or would not consent to the grades, bridges and construction methods adopted.

From this refusal of the board of supervisors to act in the premises, the petitioning railroad company appealed to the Circuit Court of Scott county, which appeal was, on motion of the board, dismissed, on the ground that petitioner's remedy was by mandamus. Whereupon, a mandamus was applied for and refused by the same court, and to this ruling, as well as to the ruling dismissing the appeal of the railroad company from

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the refusal of the board of supervisors to act upon its petition, a writ of error was allowed by this court.

The first question presented is whether or not mandamus is the proper remedy in such a case, and, if the proper remedy, should it, upon the case presented to the circuit court, have been awarded?

There is no force in the contention of defendant in error that the pendency of the writ of error to the ruling of the circuit court dismissing the appeal of plaintiff in error from the refusal of the board of supervisors to act upon its petition asking the board's consent to the proposed alteration of the location of the present county road is a bar to the prosecution of the writ of error to the ruling of the circuit court refusing the writ of mandamus.

This contention is not sustained by the case of *Supervisors v. Powell*, 95 Va. 635, 29 S. E. 682, relied on. That case does hold that where originally there is another clear and adequate legal remedy, mandamus cannot be invoked; but the "adequate remedy" which will bar mandamus must be such as reaches the end intended and actually compels the performance of the duty in question. It must be equally as convenient, beneficial, and effective as the proceeding by mandamus. The function of the writ of mandamus is to enforce the performance of duties growing out of public relations, or imposed by statute, or in some respect involving a trust or official duty. *Richmond Ry. & Elec. Co. v. Brown*, 97 Va. 26, 32 S. E. 775.

Plaintiff in error presented by petition and exhibits to the board of supervisors the facts as to the dangers to be incurred by travelers on the county road between the crossings at Wood's post-office and near the residence of J. N. Cocke, as well as to the travelers on passing trains, also the dangers of collision of trains with persons and vehicles at these crossings, and submitted a plan for the construction of a new road leaving the river and railroad at or near the post-office, and built around the mountain on a firm and stable location, where a good grade

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can be obtained and a road equally convenient constructed in lieu of the present road, and away from all contact with or danger from the railroad; but the board would neither give nor refuse its consent to the proposed alteration.

The authority for the proposed change, or any change of the route of a county road in such a case, is found in section 1294b of the Code of 1904, which section, so far as it applies to this case, is as follows: “\* \* \* but any county road \* \* \* may be altered by any such company (public service corporation) for the purposes aforesaid (avoiding or reducing the number of crossings) whenever it shall have made an equally convenient road \* \* \* in lieu thereof, the said company having first obtained the consent of the board of supervisors of the county to the alteration of the road or highway.”

All statutes must receive a reasonable construction, and we are unable to concur in the view of the statute just quoted taken by the board of supervisors in this case and approved by the judge of the circuit court, the effect of which is that the right of way for the new road must be obtained and the new road actually constructed, no matter at what cost, be ready for inspection, and leave nothing to be done except the discontinuance of the old route, before the board of supervisors has jurisdiction to consider the application for the assent of the board to the alteration of the road.

A railroad company must acquire the land upon which to construct the new county road, and as it has no right to acquire land except for its necessary purposes, it may well be doubted, as the learned counsel suggests, if it would have lawful authority to acquire land for a proposed new road to take the place of an already established county highway until the assent of the board of supervisors to the alteration is first obtained. The statute must be construed so as to enable the railroad company to exercise the power conferred, though it must at the same time be so construed as not to deprive the public of their rights in the highway to any greater extent than is necessarily

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implied from the power granted. *Charlottesville v. Railroad Co.*, 97 Va. 428, 34 S. E. 98.

The two things essential to the exercise of the statutory right in a public service corporation to alter a road are: "First," the obtaining of the consent of the board of supervisors; and the other, the making of an "equally convenient road." In other words "alteration" of a county road or highway embraces and requires, (1) a new location, (2) constructing thereon a road-way as good as the present one, (3) the discontinuance of the present road; and these three things constitute the "alteration" authorized by the statute, *supra*. The discontinuance of an existing road is not authorized till the new road is constructed, and it would be, as it seems to us, an unreasonable construction of the statute which requires a public service corporation to acquire necessary rights of way and construct the new road, and take the risk of its location as well as the proper construction thereof being rejected by the board of supervisors.

The board of supervisors in this case was fully advised as to the proposed alteration of the county road, and were only called upon to assent or refuse to assent to the alteration, and it cannot be imputed to the legislature that it intended by the provision in the statute to require, first, the construction of the new county road along the proposed route, and then have the board of supervisors to assent or refuse to assent to the alteration. If this could be maintained as the proper construction of the statute, a railroad company might construct a new county road or highway at ever so great an expense and then be not relieved of the dangers to life and property attending the location and use of the old road designed to be altered.

The statute requires the board to consent or refuse to consent to the act of altering, and if consent be given this implies something to be done in the future, viz.: the construction of an equally convenient and suitable road or highway in lieu of the old one intended to be put out of use to avoid the danger to the traveling public attending its use. The assent of the board to

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the alteration of the old road does not commit it to accept the new road unless the new road is so constructed as to make it equally as convenient and useful to the public as the old one.

By the general law—sec. 944a of the Code—when a new road is to be established or an old one changed, viewers are appointed whose first and chief duty is to report on routes, and on this preliminary report the board of supervisors act, subject to appeal to the circuit court. By this plan the question of route is settled, and the question of construction, grades, etc., follows as an incident; and the law giving public service corporations the right to change county roads had always been, until the act here in question was passed, as follows: "Any county road may be altered by any such company for the purposes aforesaid (to avoid crossings, etc.), whenever it shall have made an equally convenient road in lieu thereof." When, however, the whole subject of roads was put in the care of the supervisors of the several counties, there was added this amendment to the statute: "The said company having first obtained the consent of the board of supervisors of the county to the alteration of any road or highway."

Clearly, from the very language of the statute, as well as by analogy to the general law, the duty is imposed upon the board of supervisors, as the first step and in advance, to consent or refuse to consent to the proposed change of route, leaving the matter of construction, grades, etc., to be fixed upon and carried out.

It is not contended in this case that mandamus will lie to compel the board to exercise the discretion given to it and select a particular route for the location of the highway, but that mandamus will lie to compel the board *to give or refuse to give* its consent to the alteration of a highway to a given route. Compulsion in the first instance would take away the discretion given the board, while in the second its discretion conferred by the statute would be left unimpaired, and the board merely be compelled to take action generally, i. e., give its consent to the

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proposed route of the new road or refuse to give its consent. It will be observed that plaintiff in error is not seeking to compel by mandamus the defendant in error to consent to the route selected by the plaintiff in error, but merely to consent to the route proposed or refuse to consent thereto.

In *Wilder v. Kelly*, Judge, 88 Va. 281, 13 S. E. 483, speaking of the function of the writ of mandamus, it is said: "It is the proper remedy to compel the performance of a specific act, where the act is ministerial in its character, but where the act is of a discretionary character or of a judicial nature, it will lie to compel action generally."

And in *Broadus v. Supervisors*, 99 Va. 372, 38 S. E. 177, where the marked characteristics of a proceeding by mandamus are pointed out, the rule as stated in High on Ex. Rem., sec. 24. is approved, which is as follows: "Wherever such officers or bodies are vested with discretionary powers as to the performance of any duty required at their hands, or where, in reaching a given result of official action, they are necessarily obliged to use some degree of judgment and discretion, while mandamus will lie to set them in motion and to compel action upon the matters in controversy, it will in no manner interfere with the exercise of such discretion, nor control or dictate the judgment or decision which shall be reached. But if, upon the other hand, a clear and specific duty is positively required of any officer, and the duty is of a ministerial character, involving no element of discretion and no exercise of official judgment, mandamus is the appropriate remedy."

As remarked, plaintiff in error is only asking that the board of supervisors be compelled to take action generally, i. e., give its consent to the proposed alteration of the present road by the construction of a new road to be used by the public in lieu thereof, or refuse to give its consent. This would be only to set those officials in motion to take action upon the matters in controversy, and would in no manner interfere with the exercise of any discretion conferred upon them. The board would not



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thereby be compelled to consent to the route selected by plaintiff in error, but merely to consent or refuse to consent thereto, a duty of a ministerial nature, involving no element of discretion.

In any other view of the statute, we would have this state of affairs: Here is a public service corporation, not only authorized by law to locate and construct a line of railroad through the county of Scott for the transportation of passengers and freight, but required to locate, construct and have the railroad in operation for the convenience of the public within a limited time, finding itself confronted by a condition dangerous, not only to the operation of trains upon a located line, but dangerous to private property and to the lives of persons traveling along a county road parallel and in close proximity to the railroad for the distance of a mile, and necessitating two dangerous crossings of the county road over the railroad, which can be dispensed with by altering the county road to another route equally convenient to the traveling public, and free of the dangers incident to the present road, it applies to the board of supervisors of the county, as authorized by the statute, for consent to alter the present road, wholly at the cost of the railroad company, and is met by a ruling that the board will take no action on the application—will neither consent nor refuse to consent to the proposed alteration of the existing county road—until the railroad company has acquired the necessary right of way for the proposed new road, constructed the same and made it ready for use by the public, and which may or may not then be accepted as in lieu of the old road; whereby the railroad would be without adequate remedy, except by mandamus compelling the board to take the initial and essential action towards a settlement of the controversy, and which would not involve the exercise of any discretion, but the performance only of a ministerial duty plainly required by the statute.

We are of opinion that mandamus is the proper remedy in such a case, and that the circuit court erred in denying plaintiff

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in error the writ in accordance with the prayer of its petition. Therefore, the judgment of the circuit court will be reversed and this court will enter the order the circuit court should have entered, awarding the writ of mandamus in accordance with the prayer of plaintiff in error's petition.

Having reached the foregoing conclusion in the first of these cases, as above named, the writ of error awarded in the second will be dismissed without costs to either party.

*Mandamus awarded.*

*Writ of error dismissed.*

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**Richmond.**

CHESAPEAKE AND OHIO RAILWAY CO. v. HOFFMAN.

January 14, 1909.

1. PLEADING—*Declaration—Sufficiency*.—A declaration is sufficient if it apprises the defendant of the ground of complaint, and states sufficient facts to enable the court to say upon demurrer that the plaintiff is entitled to recover if the facts stated are proved.
2. PLEADING—*Declaration—Matters of Evidence*.—In an action to recover injuries received while engaged in work involving many details, the details of the method employed by the defendant may properly be the subject of proof, although not specifically stated in the declaration. The object of the declaration is not to set out all the facts and circumstances which are to be disclosed in the evidence, but merely to give to the defendant such reasonable information of the ground of complaint as will enable him fairly to present his grounds of defense.
3. EVIDENCE—*Opinions*.—In an action to recover damages for a personal injury it is not error to permit the plaintiff to testify whether he is capable of doing, since he received the injury, such work as he had done theretofore.
4. TRIAL—*Withdrawal of Evidence—Statements of Counsel*.—If, when a question is asked a witness, objection is made thereto, and the propounder withdraws it, saying: "We would rather withdraw the question than to give him any show of an appeal," the fact that such statement was made in the presence of the jury is not prejudicial to the objector.
5. NEW TRIAL—*Improper Evidence—Harmless Error*.—The verdict of a jury should not be set aside for the improper reception of evidence, where, as in this case, the court can see that such evidence could not have prejudiced or influenced the minds of the jury.
6. DAMAGES—*Personal Injury—Elements of Damage*.—In estimating the damages for a personal injury inflicted on the plaintiff by the negligence of defendant's servants, it is proper to instruct the jury that they may take into consideration the plaintiff's mental and physical suffering arising from his injuries, his loss of wages from the time he was prevented by said injuries from

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following such calling or business as he could have followed but for said injuries, and that the amount of damages should be reasonable and just to both parties, and should compensate the plaintiff for the loss of money which he would probably earn had not the injuries been inflicted.

7. **VERDICTS—Excessive Damages—Personal Injury.**—A verdict for \$2,500 for personal injuries cannot be set aside as excessive where it appears that the plaintiff fell more than thirty feet, that he was rendered unconscious, that his arm was mashed, his head hurt, his shoulder-blade dislocated, and his ankle badly sprained, and that he had not recovered from his injuries at the time of the trial.
8. **MASTER AND SERVANT—Railroads—Structures—Constitutional Law.**—An employee engaged in the restoration of a pier which is a part of the road-bed or track of a railroad—removing rotten timbers and substituting those that are sound—is within the terms of section 162 of the Constitution applicable to persons “engaged in the physical construction, repair or maintenance of the company’s roadway, track, or any of the structures connected therewith.”
9. **CONSTITUTIONAL LAW—Equal Protection of the Laws—Protection of Railroad Employees.**—Section 162 of the Constitution of this State, and the statute putting it into operation, for the better protection of employees of railroad companies, extend to all railroads alike, and do not violate the provision of the Fourteenth Amendment of the Constitution of the United States forbidding any State to deny to any person within its jurisdiction the equal protection of the laws. The State has the right to make reasonable classifications of legislation, and the hazardous character of the business of operating railroads renders it reasonable to enact laws for the better protection of their employees.
10. **MASTER AND SERVANT—Railroads—Negligence of Servant.**—A railroad company is under no greater obligation to care for the safety of one of its servants than he is to care for himself, and, generally, any negligence on the part of a servant amounting to the want of ordinary care, which is the proximate cause of his injury, will bar a recovery against the company.
11. **MASTER AND SERVANT—Safe Place—Repairing Unsafe Structures.**—The rule that the master is to furnish the servant a reasonably safe place in which to work does not apply to a servant employed to repair an unsafe structure. The very object of the employment is to render secure that which has become unsafe.
12. **DEMURRER TO EVIDENCE.—Room for Difference of Opinion.**—On a demurrer to the evidence by the defendant, in an action to re-

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cover damages for a personal injury negligently inflicted on the plaintiff by the defendant, if the evidence is such that reasonable men might well differ as to whether the defendant was guilty of negligence, or the plaintiff, by his own negligence, so far contributed to his injury as to bar recovery, the demurrer should be overruled.

Error to a judgment of the Corporation Court of the city of Newport News in an action of trespass on the case. Judgment for the plaintiff. Defendant assigns error.

*Affirmed.*

On the trial the plaintiff tendered one instruction on the measure of damages which was given, and is copied in the opinion below. The defendant tendered three instructions on the same subject, which the trial court refused to give.

The following are copies of the declaration, grounds of demurrer assigned to the declaration, instructions refused and specifications of grounds of demurrer to the evidence:

THE DECLARATION.

"W. F. Hoffman, plaintiff, complains of the Chesapeake and Ohio Railway Company, a corporation, defendant, of a plea of trespass on the case, for this, to-wit:

"That heretofore, to-wit, on the 18th day of October, 1906, and for a long time theretofore and thence hitherto, the said defendant was, and still is, the owner of a certain railway, roadbed, and track, in the city of Newport News, Va., extending over and across River Road, a street in said city, and operated and propelled, and caused to be operated and propelled, its cars over and along that part of its said roadbed and track extending across said street, and for, to-wit, a distance of 200 feet on each side of the said street, and laid, built, and constructed upon a trestle or framework, the property of the said defendant.

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"That constituting a part of said trestle or framework was on said last mentioned date a heavy piece of timber, to-wit, 12 inches wide, 12 inches thick, and 20 feet long, commonly called a cap sill, resting upon and supported, in part, by four upright propping posts, placed under the same and extending thence to the ground, commonly called plumb posts, for a distance of, to-wit, 30 feet. That said cap sill, resting upon said plumb posts, fitted in between two other posts, one at each end of said cap sill, also called plumb posts or end uprights, and was fastened and affixed to said last mentioned plumb posts or end uprights by heavy strips of timber laid along both sides of said cap sill, commonly called sash braces, which, in order to give reasonably necessary support to said cap sill, of right should have been bolted or affixed to, on, and along the sides of the said cap sill as well as to said last mentioned plumb posts, or end uprights, but which the said defendant had negligently and carelessly left unbolted and insufficiently affixed to said cap sill, and extending across and beyond said last mentioned plumb posts or end uprights. That resting upon said cap sill, at one end thereof, was a large, long, and heavy piece of timber, to-wit, 12 inches wide, 4 inches thick, and 30 feet long, commonly called a purlin, which extended, to-wit, 15 feet, on each side of said cap sill, which said purlin was supported at one end by a cap sill similar to the one hereinbefore mentioned, or by some other means of support, and which said purlin of right at the other end should have been supported by being lashed up, or otherwise, but the said defendant had negligently and carelessly left the said last mentioned end of the said purlin unsupported.

"That the said defendant on said last mentioned date had in its service and employment servants and carpenters engaged in working upon and repairing said trestle or framework under the direction, management, and control of a foreman or boss. That the said plaintiff was a carpenter and one of the said servants so employed and engaged in working upon and repairing said trestle or framework and thereupon, it became and

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was the duty of the said defendant to use ordinary care to provide safe and sound materials and a safe place for its said servants and carpenters to work, and in particular for the said plaintiff to work, and to use and exercise such ordinary care as was reasonably calculated to insure the safety of its said servants and carpenters, and particularly that of the said plaintiff.

"That, in the repairing of said trestle or framework, it became and was deemed necessary by the said defendant, in consequence of its decayed condition, which decayed condition was well known to the said defendant, to remove and replace the said first mentioned cap sill, and the said plaintiff was, under the direction, management, and control of said defendant's said foreman or boss, engaged in and assisting the said other servants in removing and repairing the said cap sill. That the said foreman or boss caused two of the said first mentioned plumb posts by which, in part, the said cap sill was supported, as aforesaid, to be removed and taken away, leaving only the two center plumb posts of said four plumb posts remaining in position under the said cap sill. That, in order to remove said cap sill, it became and was necessary to disconnect it from the plumb posts or end uprights between which the said cap sill fitted, as hereinbefore described, to which it was fastened or affixed by said sash braces, and thereupon, in the discharge of his duty in this regard, and in the usual and customary manner of disconnecting cap sills from plumb posts or end uprights and in the plain view of the said plaintiff, one of the said other servants entered upon the work of disconnecting the said cap sill from the said plumb posts or end uprights by sawing in two the said sash braces at a point near to and outside of where the said purlin rested upon said cap sill, and placed himself in a position where the weight of his body was, in addition to that of the said purlin, resting upon said cap sill, and partly sawed in two the said sash braces at the point above designated, and then called

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upon and requested the said plaintiff, as he had a right to do, to complete the said saving in two of the said sash braces.

"That the said defendant knew, or by the use of ordinary care might have known, that one end of said purlin was not supported and that in consequence of the decayed condition of said cap sill and of the removal of the said two plumb posts, as aforesaid, and in consequence of the failure, neglect, and omission to properly bolt or properly affix or fasten the said sash braces to the said cap sill, it became and was necessary to put propping posts under the said cap sill, or under the said purlin, which rested, as aforesaid, thereon, or in some other way to safeguard the said cap sill before the support given to it by the said sash braces being fastened or affixed to the said plumb posts or end uprights, as aforesaid, should be removed, in order to prevent its giving way under the combined weight of said purlin and of a man when said sash braces should have been sawed in two.

"That the said plaintiff was ignorant of the fact that one end of the said purlin was unsupported, and of the necessity of in some way safeguarding the said cap sill before the support given it by being fastened or affixed to said plumb posts or end uprights by said sash braces should be taken away by sawing the same in two, in order to prevent its giving way under the combined weight of said purlin, and that of a man when and after the said sash braces should have been sawed in two, and having been then and there lulled into security by the words and conduct of his said fellow workman, the said plaintiff undertook to complete the sawing in two of the said sash braces, which sawing in two had been begun by his said fellow workman, placing himself where, as of necessity he had to do, the weight of his body was added to that of the said purlin, and together with it rested on said cap sill, and sawed in two the said sash braces, when, and in consequence of the decayed condition of said cap sill, and the negligence, failure, and want of



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ordinary care of the said defendant in not putting propping posts or supports under the said cap sill, or under the said purlin, or in some other manner giving support to the said cap sill, and of the negligence and failure to use ordinary care of the said defendant in giving support to the said cap sill by properly bolting or otherwise affixing said sash braces thereto, as aforesaid, the said cap sill broke and gave way under the combined weight of the said purlin and the weight of the body of said plaintiff when and as soon as he had completed the sawing in two of said sash brace; and the said plaintiff was, in consequence of said negligence, carelessness, and want of ordinary care on the part of the said defendant caused, in consequence of the breaking of the said cap sill, to fall a distance of, to-wit, thirty feet, onto and upon the ground along with the broken piece of the said cap sill, and to be greatly bruised, hurt, injured and disabled in and upon his body, head, arms, legs, feet and ankles, and to suffer great mental and bodily pains from thence hitherto, and permanent bodily injury from thence hitherto, and to lay out and expend a large sum of money, to-wit, the sum of \$100, in and about his being relieved from his sufferings and for medical attention.

“And for this also, to-wit:

“That heretofore, to-wit, on the 18th day of October, 1906, and for a long time theretofore and thence hitherto, the said defendant was, and still is, the owner of a certain other railway, road-bed and track, in the city of Newport News, Va., extending over and across River Road, a street in said city, and operated and propelled, and caused to be operated and propelled, its cars over and along that part of its said road-bed and track extending across said street, and for, to-wit, a distance of 200 feet on each side of said street, and laid, built, and constructed upon a trestle or framework, the property of the said defendant.

“That constituting a part of said trestle or framework was, on said last-mentioned date, a heavy piece of timber, to-wit,

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12 inches wide, 12 inches thick and 20 feet long, commonly called a cap sill, resting upon and supported, in part, by four upright propping posts, placed under the same and extending thence to the ground, commonly called plumb posts, for a distance of, to-wit, thirty feet. That said cap sill, resting upon said plumb posts, fitted in between two other posts, one at each end of said cap sill also called plumb posts or end uprights, and was fastened and affixed to said last-mentioned plumb posts or end uprights by heavy strips of timber laid along both sides of said cap sill, commonly called sash braces, which, in order to give support, in addition to that given by said plumb posts, as aforesaid, were bolted or affixed thereto on and along the sides of said cap sill and extending across and beyond said last-mentioned plumb posts or end uprights; that resting upon said cap sill at one end thereof was a large, long and heavy piece of timber, to-wit, 12 inches wide, 4 inches thick and 30 feet long, commonly called a purlin, which extended, to-wit, fifteen feet on each side of said cap sill, which said purlin was supported at one end by a cap sill similar to the one hereinbefore mentioned, or by some other means of support, and which said purlin of right at the other end should have been supported by being lashed up, or otherwise, but the said defendant had negligently and carelessly left the said last-mentioned end of the said purlin unsupported.

"That the said defendant, on said last mentioned date, had in its service and employment, servants and carpenters engaged in working upon and repairing said trestle or framework under the direction, management and control of a foreman or boss. That the said plaintiff was a carpenter, and one of the said servants so employed and engaged in working upon and repairing the said trestle or framework, and thereupon it became and was the duty of the said defendant to use ordinary care to provide safe and sound materials and a safe place for its said servants and carpenters to work, and in particular for the said plaintiff to work, and to use and exercise such ordinary care as was reasonably calculated to insure the safety of its said

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servants and carpenters, and particularly that of the said plaintiff.

“That, in the repairing of the said trestle or framework, it became and was deemed necessary by the said defendant, in consequence of its decayed condition, which decayed condition was well known to the said defendant, to remove and replace the said first mentioned cap sill, and the said plaintiff was under the direction, management and control of said defendant's said foreman or boss engaged in and assisting the said other servants in removing and repairing the said cap sill; that the said foreman or boss caused two of the said first mentioned plumb posts by which, in part, the said cap sill was supported, as aforesaid, to be removed and taken away, leaving only the two center plumb posts of said four plumb posts remaining in position under the said cap sill; that, in order to remove said cap sill, it became and was necessary to disconnect it from the plumb posts or end uprights between which said cap sill fitted, as hereinbefore described, to which it was fastened or affixed by said sash braces, and thereupon, in the discharge of his duty in this regard, and in the usual and customary manner of disconnecting cap sills from plumb posts or end uprights, and in the plain view of the plaintiff, one of the said other servants entered upon the work of disconnecting the said cap sill from the said plumb posts or end uprights by sawing in two the said sash braces at a point near to and outside of where the said purlin rested upon the said cap sill and placed himself in a position where the weight of the body was, in addition to that of the said purlin, resting upon the said cap sill and partly sawed in two the said sash braces at the point above designated, and then called upon and requested the said plaintiff, as he had a right to do, to complete the said sawing in two of the said sash braces.

“That the said defendant knew, or by the use of ordinary care might have known, that one end of said purlin was not supported, and that, in consequence of the decayed condition

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of the said cap sill and of the removal of the said two plumb posts, as aforesaid, it became and was necessary to put propping posts under the said cap sill, or under the said purlin, which rested, as aforesaid, thereon, or in some other way to safeguard the said cap sill before the support given to it by the said sash braces being fastened or affixed to the said plumb posts or end uprights, as aforesaid, should be removed, in order to prevent its giving way under the combined weight of said purlin and of a man when said sash braces should have been sawed in two.

“That the said plaintiff was ignorant of the fact that one end of the said purlin was unsupported and of the necessity of in some way safeguarding the said cap sill before the support given it by being fastened or affixed to said plumb posts or end uprights by said sash braces should be taken away by sawing the same in two, in order to prevent its giving way under the combined weight of said purlin and that of a man, and when and after the said sash braces should have been sawed in two, the said sash braces being bolted or affixed to the said cap sill along the sides thereof, as aforesaid, and, having been then and there lulled into security by the words and conduct of his said fellow-workman, the said plaintiff undertook to complete the sawing in two of the said sash braces, which sawing in two had been begun by his said fellow-workman, placing himself where, as of necessity he had to do, the weight of his body was added to that of the said purlin, and together with it rested on said cap sill, and sawed in two the said sash braces, when, and in consequence of the decayed condition of the said cap sill, and the negligence, failure and want of ordinary care of the said defendant in not putting propping posts under the said cap sill or under the said purlin, or in some other manner giving support to the said cap sill, the said cap sill broke and gave way under the combined weight of the said purlin and the body of said plaintiff when and as soon as he had completed the sawing of the said sash braces in two, and the said plain-

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tiff was, in consequence of said negligence, carelessness and want of ordinary care on the part of the said defendant caused, in consequence of the breaking of the said cap sill, to fall a distance of, to-wit, thirty feet, onto and upon the ground along with the broken piece of the said cap sill, and to be greatly bruised, hurt, injured and disabled in and upon his body, head, arms, legs, feet and ankles, and to suffer great mental and bodily pains from thence hitherto, and permanent bodily injury from thence hitherto, and to lay out and expend a large sum of money, to-wit, \$100, in and about his being relieved from his sufferings and the medical attention.

"And the said plaintiff says that by reason of the premises, as set forth in the foregoing two counts of this declaration and in each of them, he has suffered and demands damages to the extent of \$5,000. And therefore he brings his suit."

"DEMURRER TO DECLARATION."

"The said defendant, by its attorney, comes and says that the said declaration, and each and every count thereof, is insufficient in law, and for grounds of demurrer alleges the following:

"First. That said declaration, and each and every count thereof, is so indefinite that it does not apprise the defendant of the nature of the case against it, or the alleged negligence of said defendant, for which alleged negligence a recovery is sought.

"Second. That each and every count of said declaration does not show what or who operated and propelled, or caused to be operated or propelled, cars over and along that part of said road-bed and track extending across said street, as in said declaration, and each and every count thereof is alleged.

"Third. That the alleged duty of said defendant, charged in the first count of said declaration, to bolt or affix the so-called sash brace to, on and along the sides of the so-called

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cap sills, was no duty whatever resting on defendant, and further, if such duty existed, it was not a duty owing to this plaintiff, or such a duty as that the defendant would be liable to plaintiff for its failure to observe the same.

"Fourth. That the first count of the said declaration does not specifically allege how the so-called sash brace should have been bolted or affixed, or otherwise fastened to the said so-called cap sills, in what manner, by what means, or otherwise howsoever, and said first count does not charge any duty for the breach whereof the defendant is liable to the plaintiff, or otherwise howsoever.

"Fifth. That the first count of said declaration does not allege wherein the said defendant was negligent in leaving the so-called sash brace unbolted and insufficiently affixed to said so-called cap sills; nor does said count show with legal particularity what negligence or carelessness, if any, existed in allowing said so-called sash brace to extend across and beyond so-called plumb posts or end uprights; nor does the said declaration show that it was the duty of said defendant to construct said trestle otherwise than as constructed, or, if it was said duty, how and in what way said duty was owing to the plaintiff herein, or in what manner said defendant negligently and carelessly performed its duty; nor does said first count show in what the alleged negligence or carelessness of said defendant consisted in leaving the so-called sash brace unbolted and insufficiently affixed, or otherwise.

"Sixth. That the said declaration, and each and every count thereof, does not show any duty on the part of the defendant to support, at the alleged unsupported end, the so-called purlin, and why and in what manner the so-called purlin should have been lashed up, or any duty whatsoever on the part of said defendant, to lash up so-called purlin, or how said duty, if any, became and was owing to the said plaintiff, or how the plaintiff suffered or was injured thereby, or wherein said defendant was negligent or careless in leaving said so-called purlin un-

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supported, or how the alleged negligence or carelessness of said defendant in so leaving said so-called purlin unsupported, as charged, operated, or in any wise contributed to plaintiff's damage, hurt, or injury.

"Seventh. The said declaration does not, nor does any count thereof, show how it was and became the duty of the defendant to furnish safe and sound materials, as therein charged, and a safe place, or what unsafe or unsound materials, if any, were furnished, or in what other way howsoever the said defendant failed or omitted to perform its legal duty in the premises.

"Eighth. The said declaration, and each and every count thereof, shows that the said plaintiff was guilty of such negligence as would bar any recovery.

"Ninth. That the said declaration, and each and every count thereof, shows that the said defendant was not guilty of any negligence whatsoever, and, if the said defendant was guilty of any negligence, that the plaintiff was guilty of such contributory negligence as would bar any recovery herein.

"Tenth. The said declaration, and each and every count thereof, alleges that the said plaintiff placed himself 'where as of necessity he had to do, the weight of his body was added to that of said purlin, and together with it rested on said cap sill,' etc., without alleging how or why the said plaintiff so placed himself in said position, or that it became and was his duty to so place himself in said position."

## "DEFENDANT'S INSTRUCTIONS REFUSED."

"No. 1. The court instructs the jury that they cannot allow the plaintiff any sum on account of any permanent injury to the mental health of the plaintiff.

"No. 2. The court instructs the jury that the income now earned and the probable future income which the plaintiff may earn from his grocery business is material to the question of the probable future earnings of the plaintiff, and the court in-

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structs the jury that, in default of proof by the plaintiff of his earnings in such business, the jury may presume that his earnings from the said business exceed what his earnings would have been had the plaintiff remained in the same employment in which he had engaged prior to the injury.

"No. 3. The courts instructs the jury that if they believe from the evidence that the plaintiff is now earning a greater sum in his grocery business than he would have earned if the injury had not occurred, and had he remained in his then present and then prospective employment, and further believe that the plaintiff's reasonable prospect of future earnings in his said grocery business equal or exceed what his prospective earnings would have been if the injury had not occurred, the jury cannot allow to the plaintiff any damages on the score of a lessened future earning capacity."

"SPECIFICATIONS OF GROUNDS OF DEMURRER TO EVIDENCE."

"(1) That the evidence fails to disclose any negligence whatever upon the part of the defendant, its servants or agents, on account of which the plaintiff could recover in this action.

"(2) Because the evidence discloses that the work whereon the plaintiff was engaged at the time of receiving the injury complained of was not such work as is referred to in section 162 of the Constitution of Virginia.

"(3) That, even if the evidence discloses that the work whereon the plaintiff was engaged at the time of receiving the injury of which he complains was of the character referred to in section 162 of the Constitution of Virginia, it further discloses that the case of the said plaintiff does not come within any of the provisos of the said section of the Constitution.

"(4) That, even if the evidence shows that the character of work in which the plaintiff was engaged at the time of receiving his injury was of the character referred to or comprehended in the said section 162 of the Constitution of Virginia of 1902



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(Code 1904, p. 249), the evidence further discloses that the work whereon the plaintiff was engaged was not connected in any way with the risks ordinarily incident to railroad work, but presented merely the same dangers as would attend in the demolition of any ordinary building or structure in private ownership, and that the provisions of said section 162 of the Virginia Constitution cannot be applied to the case of the plaintiff in such manner as to prevent the defendant from the use of such defenses based on the doctrine of fellow servant, assumption of risk and other defenses, according as it would have been entitled thereto had the said injury occurred before the adoption of the said section of the Constitution, because under the circumstances of this case the application of said section 162 to the facts disclosed by the evidence contravenes the provisions of section 1 of the Fourteenth Amendment of the Constitution of the United States, and particularly that portion of said section which prohibits any State from denying to any person within its jurisdiction the equal protection of the laws.

“(5) Because the evidence discloses that the injury whereof the plaintiff complains was brought about, or contributed to, by the defendant's own negligence in a failure to use due care to prevent injury from causes and risks open and obvious, which were, or ought to have been, known by him.

“(6) That the evidence further discloses that, in addition to the negligence of the said defendant and co-operating therewith, the injury of the said plaintiff was caused by the negligence (if there be any negligence at all shown) of a fellow servant in the same department of labor and in the same character of employment, and that the said negligence, if any, of the said fellow servant, was a risk assumed by the plaintiff in his contract of employment.

“(7) The evidence further discloses that there were several ways of doing the said work open to the defendant and known to him, one or more of which the servant knew, or reasonably should have known, was safe, and the other of which the servant

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knew, or reasonably should have known, was dangerous, and that the said plaintiff failed to adopt a safe way of doing the said work.

"(8) That the master, being engaged on the character of work disclosed by the evidence, performed all his duties to the said plaintiff when he provided for the use of the said plaintiff those appliances and instrumentalities by which the plaintiff could have done the work in a safe manner, and the said defendant is not responsible for the non-use of said appliances by the said plaintiff, or by his fellow servants, or the misuse of said appliances by either.

"(9) The evidence shows that the breaking of the said cap sill was caused by a defect therein not apparent to the defendant, but, on the contrary, it was apparent to the plaintiff, or should have been apparent to him in the exercise of ordinary care.

"(10) That the evidence discloses that the servant had better opportunities of observing the defects of the said cap sill than the defendant, or any inspecting agent of the defendant.

"(11) That the evidence discloses that the injury of which the plaintiff complains occurred incidental to an employment which was known to the plaintiff to be dangerous, and the dangers of which the plaintiff assumed.

"(12) That the plaintiff owed the duty of using reasonable care to provide for his own safety, and the evidence discloses that his opportunities for knowledge of any defect of the cap sill, or non-support of the cap sill or purlin, were greater, by the exercise of ordinary care, than those of the master by the exercise of a like degree of care.

"(13) Because the evidence discloses that the plaintiff was cutting away the support of a certain heavy timber, and that it was his duty before doing so to use reasonable care to ascertain whether the timber was otherwise reasonably supported, and to so provide for his own safety as that he would be secure from injury in the event of the falling of the said timber; and the

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evidence discloses that such means had to the knowledge of the plaintiff been furnished by the defendant and were subject to his use.

“(14) That the evidence fails to disclose any negligence on the part of the said defendant.

“(15) That the evidence fails to disclose that the sash braces in the declaration mentioned should have been bolted or affixed to the sides of the cap sill, or that they were carelessly or negligently left unbolted or insufficiently affixed to said cap sill extending across the plumb post as in the declaration is alleged; but, on the contrary, discloses that, if the said sash braces had been so affixed, the injury would nevertheless have occurred, and the evidence further discloses that the duty of affixing and arranging all temporary supports, which in the exercise of ordinary care would have prevented the breaking of the said cap sill, resultant upon the cutting of the same, rested upon the plaintiff, and that the defendant in the knowledge of the plaintiff furnished reasonable means for such temporary support; and the evidence further shows that the office of the sash brace was not one of support for the said cap sill, but to prevent the rending or pulling apart laterally of the original structure of which it formed a part.

“(16) That the evidence discloses that instead of the said purlin being lashed up as the declaration charges of right it should have been that the same was negligently and carelessly left unlashd and unsupported by the said plaintiff, whose duty it was to lash the same before cutting the said sash brace.

“(17) That the evidence does not disclose any negligence upon the part of the defendant in the performance of its duty in the said declaration alleged ‘to use ordinary care to provide safe and sound materials and a safe place for its said servants and carpenters to work, and in particular for the said plaintiff to work, and to use and exercise such ordinary care as was reasonably calculated to insure the safety of its servants and carpenters, and particularly that of the said plaintiff, on the

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contrary, the evidence shows that the defendant performed all and singular of the said duties.

"(18) That it does not appear, as in the said declaration is alleged, that the defendant knew, or by the exercise of ordinary care could have known, of the decayed condition of the said cap sill. On the contrary, the evidence shows that the said cap sill presented the appearance of a sound timber except that portion of it which the plaintiff observed to be rotten.

"(19) That the evidence fails to disclose that the said plaintiff was 'under the direction, management and control of the said defendant's foreman or boss, engaged in and assisting the said other servants in removing and repairing the said cap sill,' as in the said declaration is alleged. On the contrary, the evidence shows that the said cap sill was not undergoing a process of reparation, but that the same was being removed by the plaintiff without specific direction upon the part of the said foreman or boss, and that the said plaintiff was provided by the defendant with all and every suitable appliance and instrumentalities for the safe removal of the same.

"(20) That the evidence shows that the said plaintiff in undertaking the work of sawing the said sash braces on the said purlin did so at the invitation of a fellow servant of precisely the same grade and authority as that of the said plaintiff, and the evidence further fails to disclose that the said fellow servant had any right to call upon the said plaintiff to finish the work which he had begun, or to request him to do so by any instrumentality involving greater danger to the user thereof.

"(21) The evidence fails to disclose that the defendant knew, or by the exercise of ordinary care might have known, that one end of the said purlin was not supported, and further fails to disclose any duty upon the part of the defendant to put propping posts under the cap sill or under the purlin. On the contrary, it shows that the duty of supporting the said cap sill and purlin rested upon the said plaintiff.

"(22) That the evidence discloses that, if the plaintiff was

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ignorant of the fact that one end of the purlin was unsupported, such ignorance was negligence contributing to his injury.

"(23) That the evidence fails to disclose that the plaintiff was ignorant of the necessity of in some way safeguarding the cap sill before the sash braces were sawed in two. On the contrary, the evidence shows the same knowledge of safeguarding the said cap sill as that possessed by the defendant, and that, moreover, it was the duty of the said plaintiff to safeguard the same.

"(24) That the evidence fails to show that the said plaintiff was lulled into security by the words and conduct of his said fellow servants and workmen, and, even if the evidence had disclosed that he was so lulled, it was his duty to use reasonable care to observe the situation himself.

"(25) That the evidence discloses that the accident to the plaintiff was not as in the declaration is alleged, 'in consequence of said negligence, carelessness, and want of ordinary care upon the part of the said defendant caused to fall,' but, on the contrary, the evidence discloses that the fall of the said plaintiff was due to his own negligence, carelessness, failure to perform his duties, and his own want of ordinary care.

"Wherefore, for want of sufficient matter in that behalf shown to the jury in evidence aforesaid and because of the grounds aforesaid, the said defendant prays judgment, and that the jurors aforesaid be discharged from giving any verdict on the said issue, and that the plaintiff be barred from having or maintaining his said action against it, the said defendant."

*R. G. Bickford and S. O. Bland*, for the plaintiff in error.

*E. J. DeJarnette, Jr., W. B. Colonna and John W. Friend*, for the defendant in error.

KEITH, P., delivered the opinion of the court.

While working as a mechanic upon a pier belonging to the

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Chesapeake and Ohio Railway Company, Hoffman sustained injuries for which he brought suit, and the jury rendered a verdict in his behalf for \$2,500, subject to a demurrer to the evidence.

Numerous rulings of the trial court were excepted to, and are now before us for review upon a writ of error awarded the railway company.

The first error assigned is that the demurrer to the declaration was overruled by the trial court.

The declaration is a lengthy one. The circumstances out of which the cause of action grew, and which it relates, are quite complicated, but we are of opinion that it meets all the requirements of proper pleading. It is sufficient to apprise the adverse party of the ground of complaint, and states sufficient facts to enable the court to say upon demurrer that the plaintiff is entitled to recover, if the facts stated are proved. *Hortenstein v. Va.-Carolina Ry. Co.*, 102 Va. 914, 47 S. E. 966.

With this general statement, we refer to the declaration itself without further discussion. We are of opinion that the demurrer was properly overruled.

Two bills of exception are taken to the admission of testimony over the objection of plaintiff in error.

The first is because the witness, Taylor, was asked by defendant in error: "In the usual course of pulling down these cap sills was it, or was it not, the custom to support the cap sill in some way, or to support the purlin?" To the asking of which question counsel for defendant excepted, on the ground that there was no appropriate allegation in the declaration under which the question could be asked, or the evidence admitted. But the court overruled the objection and permitted the witness to answer, who said: "Well, we use a block and fall on the end of these caps, after we had moved them over, to lower them down; but we didn't tie the caps up and let them stay there, or anything of that kind; we just simply throw the

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block and fall on the end of them to lower them down after we break the post from under them."

It is true that this specific act is not mentioned in the declaration, but the declaration does disclose that the work was being done upon a trestle or pier, which constituted a part of the railway company's track; that the work involved demolition and construction, the taking out of decayed or insufficient parts and the substitution for them of sound and sufficient timbers; and the details of the method employed by the company in the performance of this work may properly be the subject of proof, although not specifically stated in the declaration; for the object of the declaration is not to set out all the facts and circumstances which are to be disclosed in the evidence, but merely to give to the defendant such reasonable information of the ground of complaint as will enable him fairly to present his grounds of defense.

The second exception is to the action of the court in permitting counsel to ask defendant in error, who was a witness in his own behalf, whether he was capable of doing since he received the injury such work as he had done theretofore. To this question counsel for plaintiff in error objected, because it would be to enable the witness himself to determine his capability for work at the time of the trial when he should have by proof shown his present condition and the amount he was capable of doing before, and leave it to the jury to determine the effect of the injury.

The ruling of the court was, we think, correct. It would be straining to an unreasonable extent the doctrine which limits opinion evidence to say that a witness should not be allowed to express an opinion as to the extent and effect of an injury received upon his capacity to labor. Certain it is that he is in a better position to know than anyone else can be, and as he testifies in the presence of the jury and is subject to cross-examination as to all the conditions upon which his opinion is

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founded, we cannot think that it was error to permit him to testify.

The third bill of exception was because counsel for defendant in error were permitted to ask Dr. Newby whether he had ever had any patients to come under his direct charge who had received an injury by reason of a blow on the head, to which the witness answered: "Oh, yes, sir." Whereupon defendant in error, by counsel, asked the witness the following question: "What was the result in the other cases?" Thereupon plaintiff in error, by counsel, objected, but the court overruled the objection and permitted the witness to answer; but before the answer had been given counsel for defendant in error withdrew the question, saying: "It has occurred to us, your Honor, that we will not press that. We will withdraw it—his individual experience in that regard. We would rather withdraw the question than to give him any show of an appeal"; and the question was withdrawn. To the statement of counsel made before the court and jury, that they would rather withdraw the question than give the plaintiff in error any show of appeal, plaintiff in error excepted.

A case which could be prejudiced or injuriously affected by a circumstance so trivial must be of an exceedingly delicate and sensitive nature, and must rest upon an unstable and insecure foundation.

The fourth bill of exceptions is because defendant in error was allowed to ask the witness, C. C. Leake, who testified on behalf of the railway company: "What is the usual life of timber exposed as that was—the same character of timber?"

Plaintiff in error objected to this upon the ground that it did not refer to any charge contained in the declaration, and was not relevant to any issue in the case; and after the evidence was concluded, but before the case was submitted to the jury, plaintiff in error moved to strike out all the testimony of the witness, C. C. Leake, concerning the age of pier No. 3, and the



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life of the timber used in construction thereof, because there was no allegation in the declaration under which it could be introduced, and the same was not relevant to any issue in the case.

We are not prepared to say that the evidence was irrelevant; but in view of the uncontradicted testimony as to the condition of the timbers in that pier, we have no hesitation in saying that its admission could have had no such prejudicial effect upon the minds of the jury as to justify the court in reversing the judgment for that cause. However opinions may differ as to the probable life of the timbers in that pier, there could be no diversity of opinion as to the fact that it was at the time of the accident and of the trial in large part utterly rotten and worthless. The wonder is that, with timbers apparently necessary to the structure in the condition in which they are shown to have been by the uncontradicted evidence in this case, the traffic of a railway company could have been moved over tracks laid upon this pier.

The assignments of error based upon the four bills of exception which we have considered are not well taken.

The fifth bill of exception is because, after the evidence had been concluded, the court instructed the jury "that in estimating the plaintiff's damages they may take into consideration his physical and mental suffering arising from his injuries received on the 18th day of October, 1906, his loss of wages from the time he was prevented by said injuries from following such calling or business as he could have followed but for said injuries, and that the amount of damages should be reasonable and just to both parties, and should compensate the plaintiff for the loss of money which he would probably earn had not the injuries occurred."

The sixth bill of exceptions is to the action of the court in refusing certain instructions asked for by plaintiff in error.

It will be observed that the instruction given and those refused were designed as a guide to the jury in the estimation

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of damages. We are of opinion that the instruction given by the court correctly and sufficiently states the law to enable the jury to apply the evidence in determining what would be just compensation to the defendant in error for the injuries which he had sustained, provided they were received as the result of the negligence of plaintiff in error.

The railway company, after the evidence had been concluded, and the jury had been instructed, demurred to the evidence, and thereupon the jury found a verdict for \$2,500, subject to the defendant's demurrer to the evidence. The railway company, through its counsel, moved the court to set aside this verdict because of errors in admitting, refusing to admit, excluding and failing to exclude evidence; because the verdict was contrary to the law and the evidence; because of misdirection and erroneous instructions given to the jury, and because the amount of damages awarded is excessive.

It appears that Hoffman fell more than thirty feet; that he was rendered unconscious; that his arm was mashed, his head was hurt, his shoulder-blade was dislocated, and his ankle badly sprained; and that he had not at the time of the trial recovered from these injuries. We think it plain that we cannot disturb the verdict as being excessive.

It only remains for us to consider whether or not the evidence was sufficient, considered as upon a demurrer, to sustain the verdict.

In obedience to the statute, the railway company stated the grounds upon which it demurred to the evidence. It embraces twenty-five specifications. To notice each of them specifically would be wearisome and unprofitable. In great part they are merely varying forms of the plea of not guilty. If there be no evidence to establish negligence upon the part of the railway company, then the judgment should have been in favor of the company, but in that inquiry we must be governed by the rule which our statute (section 3484) prescribes as to demurrers to evidence, which has been applied in cases so numerous and

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varied as to render wholly unnecessary any effort to give it additional illustration.

It is contended that section 162 of the Virginia Constitution does not apply to this case, because Hoffman, at the time he sustained the injuries of which he complains, was not engaged in the physical construction, repair or maintenance of the company's roadway, track, or any of the structures connected therewith. The contention is that the work was one of demolition; but in this view we cannot concur. The pier was a part of the roadbed or track of the railroad. In the course of years the timber out of which it was constructed had decayed, and the pier or trestle had become unsafe. A large number of workmen were engaged in its restoration, and in the course of their duties it became necessary to remove rotten timber and to replace it with that which was sound—to demolish in order that they might rebuild. The ultimate object was the construction of a safe pier; a necessary incident was the removal or destruction of so much of it as had become unsafe. It would seem, therefore, that it was plainly within the terms of the Constitution.

But it is said that, if section 162 of the Virginia Constitution applies to the facts of this case, it contravenes the provisions of section 1 of the Fourteenth Amendment to the Constitution of the United States, which prohibits any State from denying to any person within its jurisdiction the equal protection of the laws.

It is conceded that the legislature may classify legislation, but that the classification must be upon a natural and reasonable basis.

Reliance is placed upon the opinion of the Supreme Court of the United States in the case of *Gulf & S. F. Ry. Co. v. Ellis*, 165 U. S. 155, 17 Sup. Ct. 255, 41 L. Ed. 666. In that case a State statute imposing an attorney's fee of \$10 in addition to costs upon railway corporations omitting to pay certain claims within a certain time after presentation, applying to no other corporations or individuals, was held to be

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unconstitutional as denying to railways the equal protection of the laws. Mr. Justice Brewer, in the course of his opinion, says, that "the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection.

In the case of *St. L. & San Francisco Ry. Co. v. Mathews*, 165 U. S. 1, 17 Sup. Ct. 243, 41 L. Ed. 611, a Wisconsin statute making every railroad corporation liable for all property injured or destroyed by fire from its locomotives, and giving the railroad company an insurable interest in the property for its protection, was held to be constitutional and valid. "Such statute," it is said, "neither violates any contract between the State and the railroad company, nor deprives the company of its property without due process of law, nor denies it the equal protection of the law." In this case, railroad companies were legislated against as a class, and were placed upon a different footing from other persons in the community, but the classification was held to be a reasonable and proper one, and not resting upon an arbitrary distinction.

In *Missouri Pacific Ry. Co. v. Mackey*, 127 U. S. 205, 8 Sup. Ct. 1161, 32 L. Ed. 107, a law of Kansas making a railroad company liable to an employee for the negligence or mismanagement of other employees or agents of the same company, was held not in conflict with the Fourteenth Amendment, and that it did not deprive the company of its property without due process of law or deny to it the equal protection of the laws. The court said, that "legislation which is special in its character is not obnoxious to the last clause of the Fourteenth Amendment, if all persons subject to it are treated alike, under similar circumstances and conditions, in respect both to the privileges conferred and the liabilities imposed."

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"The hazardous character of the business of operating a railway," said the court, "would seem to call for special legislation with respect to railroad corporations, having for its object the protection of their employees as well as the safety of the public. The business of other corporations is not subject to similar dangers to their employees, and no objections, therefore, can be made to the legislation on the ground of its making an unjust discrimination. It meets a particular necessity, and all railroad corporations are, without distinction, made subject to the same liabilities."

We think that the provision in our Constitution and the act of the legislature, putting it into operation, are not in conflict with the Constitution of the United States.

There is no doubt that it is true, as plaintiff in error maintains, that an employee owes to himself the duty of caution and care for his own protection. This court has in numerous cases enforced this principle.

As was said in *Darracott v. C. & O. Ry. Co.*, 83 Va. 294, 2 S. E. 511, 5 Am. St. Rep. 266, it is the duty of an employee to use ordinary care to avoid injury to himself, for the company is under no greater obligation to care for his safety than he is himself, and he must inform himself, so far as he reasonably can, respecting the dangers as well as the duties incident to the service. And, in general, any negligence of an employee amounting to the want of ordinary care, which is the proximate cause of the injury, will defeat an action against the company." See *Pittard's Admr. v. Southern Ry. Co.*, 107 Va. 1, 57 S. E. 561.

The doctrine is well stated in Labatt on Master and Servant, sec. 332, that "a servant is not in the exercise of ordinary care, unless, at each stage in the progress of his work, he makes an effective use of his bodily and mental faculties, and observes as attentively as is reasonably possible under the circumstances the condition of the instrumentalities by which his safety may be affected, and the results of their operation by himself or

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others, in so far as that operation may tend to subject him to danger."

We concede that the doctrine which requires the master to furnish a safe place to the employee in which to do his work does not control in this case, where the servant was employed in repairing an unsafe structure. The very object of his employment was to render secure a structure which had become dangerous, and his employment involving as it did the tearing down, in part, of an existing structure caused continued changes in his environment, which demanded constant care and caution upon the part of the employee to avoid injury.

The evidence shows that the pier was extensive and complicated in its structure. A model was introduced during the course of the argument, which to the uninstructed presented only a wilderness of timbers, but which doubtless to the educated eye displayed an intelligent combination of correlated parts, mutually bracing and strengthening each other, so as to enable the completed structure to resist the strain and support the burden which was to be placed upon it. A number of men were employed, some below and some above. It was quite impossible for each one of those employees to be fully advised of what was done by his fellow-servant, or how the work of that fellow-servant, engaged in removing or replacing some one of the innumerable interdependent parts, might affect his own safety. It would have been a reasonable precaution, therefore, if the railway company, in order to safeguard its employees, had stationed some one whose duty it should be to overlook and direct the progress of the work, and to warn those engaged of impending danger.

We shall quote from the declaration a description of the situation at the moment of the accident: Constituting a part of the trestle on which defendant in error was engaged, there was a heavy piece of timber, twelve inches wide, twelve inches thick and twenty feet long, commonly called a cap-sill, resting upon and supported, in part, by four upright propping posts,

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placed under the same and extending thence to the ground, commonly called plumb-posts, for a distance of thirty feet. The cap-sill, resting upon said plumb-posts, fitted in between two other posts, one at each end of the cap-sill, also called plumb-posts or end-uprights, and was fastened and affixed to said last mentioned plumb-posts or end-uprights by heavy strips of timber laid along both sides of said cap-sill, commonly called sash-braces, which in order to give reasonable necessary support to said cap-sill, of right should have been bolted or affixed to, on and along the sides of the said cap-sill, as well as to said last mentioned plumb-posts or end-uprights, but which the said defendant had negligently and carelessly left unbolted and insufficiently affixed to said cap-sill and extending across and beyond said last mentioned plumb-posts or end-uprights; that resting upon said cap-sill, at one end thereof, was a large, long and heavy piece of timber, twelve inches wide, four inches thick and thirty feet long, commonly called a purlin, which extended fifteen feet on each side of said cap-sill, which said purlin was supported at one end by a cap-sill similar to the one hereinbefore mentioned, or by some other means of support, and which said purlin, of right, at the other end should have been supported by being lashed up, or otherwise, but the defendant had negligently and carelessly left the said last mentioned end of the said purlin unsupported. That in repairing the trestle it became necessary, in consequence of its decayed condition, to remove and replace the first mentioned cap-sill, and the plaintiff was engaged in removing it; that the foreman or boss caused two of the first mentioned plumb-posts, by which in part said cap-sill was supported, to be removed and taken away, leaving only the two center plumb-posts remaining in position under the said cap-sill; that in order to remove said cap-sill it became necessary to disconnect it from the plumb-posts or end-uprights between which the said cap-sill fitted, to which it was fastened

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or affixed by said sash-braces, and thereupon, in the discharge of his duty and in the usual and customary manner of disconnecting cap-sills from plumb-posts or end-uprights and in the plain view of the plaintiff, one of the other servants entered upon the work of disconnecting the said cap-sill from the said plumb-posts or end-uprights by sawing in two the said sash-braces at a point near to and outside of where the said purlin rested upon said cap-sill, and partly sawed in two the said sash-braces at the point above designated, and then called upon and requested the plaintiff, as he had a right to do, to complete the sawing in two of said sash-braces. Hoffman, at the request of his fellow-servant, took his place and commenced to complete the work upon which he was engaged. In the mean time, two of the plumb-posts which had supported the cap-sill upon which he was standing were removed, and when the sash-braces were severed, Hoffman's weight superadded to that of the sill itself was more than the timber in its decayed condition would bear, and he fell and received the injuries of which he complains.

In the course of Hoffman's evidence he was asked:

"Did you know the cap-sill was not supported at one end of it, as it has been testified it was not supported—I mean the purlin?

"A. No, sir, I did not notice the purlin at all, for the simple reason that this man, Mr. Harrell, had been working there a long time before I had, and had about twelve months' experience, and I thought he would do the work right before we got together on it.

"Q. Then Mr. Harrell was doing the work, and called on you before it was completed?

"A. He started to do the work. And another thing, they didn't notify me to take the plumb-post out. They never take them out to saw them off.

"Q. You didn't know the plumb-post had been taken out from underneath the cap-sill?



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"A. No, sir, that is something that is never done until the sash-brace is cut loose."

We think that there was evidence sufficient to go to the jury and for them to say whether or not the railway company was guilty of negligence resulting in the injuries of which defendant in error sustained; and, if so, whether defendant in error, by his own negligence so far contributed to his injury as to bar his recovery. It was a case, about which, upon both propositions, reasonable men might well differ, and in such cases it is settled law that the jury must decide the controversy.

The judgment must be affirmed.

*Affirmed.*

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Syllabus.

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**Richmond.**

## CITY OF RICHMOND v. WOOD.

January 14, 1909.

1. EVIDENCE—*Opinions*.—A witness may state whether or not at a given time he saw anything indicating that a sewer was too small to carry off the water. This is not the expression of an opinion demanding expert knowledge.
2. PLEADING—*Sufficiency of Declaration—Allegation and Proof*.—A declaration which alleges that water and sewerage from a defective city sewer entered into and upon certain property, to-wit, a lot of land with a dwelling thereon owned by the plaintiff, and which concludes with an allegation: "the said plaintiff was otherwise greatly injured and damnified," is broad enough to cover the damage done to all the buildings on the lot.
3. PLEADING—*Declaration—Bill of Particulars—Code, Section 3249*.—The object of section 3249 of the Code is to simplify and shorten pleadings, by providing that, if the declaration or other pleading do not present distinctly the grounds or subject of action, the plaintiff, if required to do so, should file such a statement of particulars as will put the defendant in possession of the character thereof.
4. PLEADING—*Damages—General Damages—Allegation in Declaration—Bill of Particulars*.—Damages which are the necessary and probable result of an act of omission are termed general, and are legally imported and may be recovered, although not specifically claimed in the declaration. If particulars are desired, they may be demanded under section 3249 of the Code.
5. EVIDENCE—*Experts—Knowledge of Facts—Hypothetical Questions*.—Before the opinion of an expert, based on facts to which he has not himself testified, can be admitted, he must fully understand the facts already proved, and his testimony must come in response to a hypothetical question embodying the evidence.
6. MUNICIPAL CORPORATIONS—*Overflowing Sewers—Evidence—Other Overflows—Complaints*.—In an action to recover damages resulting from the overflow of a city sewer on a given date, other over-

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flows in the city on that date may be shown in order to prove that the rain storm on that day was extraordinary, but it is not permissible to show whether there were many *complaints* of overflows. Facts, not complaints, are admissible. Those who complained should be brought to prove the facts upon which the complaints rested.

7. INSTRUCTIONS—*Applicability to a Single Count.*—If an instruction properly states the law applicable to the facts which the plaintiff has pleaded and undertaken to prove, it need not tell the jury to which count of the declaration it is applicable, in the absence of a request to that effect, or some circumstances rendering it necessary.
8. INSTRUCTIONS—*Jury Fully Instructed—Defective Instruction.*—Instructions are to be read as a whole, and if, when so read, it is seen that the law applicable to the case was fully propounded and without prejudice to the defendant, a verdict in favor of the plaintiff will not be set aside because some of the instructions did not fully propound the law.
9. MUNICIPAL CORPORATION—*Obstructed Sewer—Extraordinary Storm.*—If by the want of ordinary care a city sewer becomes choked, and a plaintiff is damaged as a result thereof, the city is liable for such damages; so, likewise, if a culvert becomes choked because of the want of ordinary care on the part of the city, and the condition of the culvert is the real and proximate cause of the injury to the plaintiff's property, the fact that there was an extraordinary flood at the time will not relieve the city from liability.
10. MUNICIPAL CORPORATIONS—*Inadequate Sewer—Extraordinary Flood.*—An extraordinary flood which will excuse a city for an overflow of its sewers must be such as could not reasonably have been expected in that locality.
11. INSTRUCTIONS—*Invited Error.*—A party cannot object to an addition to an instruction in the same language as another instruction offered by him. He cannot invite an error and then be heard to complain of it.
12. APPEAL AND ERROR—*Objection to Competency of Evidence.*—A party cannot object to the competency of evidence for the first time in the appellate court.
13. VERDICTS—*Proper Instructions—Sufficiency of Evidence.*—The verdict of a jury will not be set aside as contrary to the law and the evidence where it appears that the case was fairly submitted to the jury under proper instructions, and there was ample evidence to support the verdict.

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Opinion.

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Error to a judgment of the Law and Equity Court of the city of Richmond in an action of trespass on the case. Judgment for the plaintiff. Defendant assigns error.

*Affirmed.*

The opinion states the case.

*Henry R. Pollard and George Wayne Anderson*, for the plaintiff in error.

*John A. Lamb and Edmund C. Harrison*, for the defendant in error.

HARRISON, J., delivered the opinion of the court.

This action was brought by the defendant in error to recover from the city of Richmond damages for injuries to his property, caused by an alleged overflow of one of the sewers of the city.

The declaration contained two counts, the first charging the city with negligence in allowing the sewer to become and remain obstructed, choked and out of repair; and the second averring that the city was negligent in maintaining a sewer which it knew was too small.

There was a verdict and judgment thereon for \$300 in favor of the plaintiff, which this writ of error brings before us for review.

The first bill of exceptions taken by the city is to the action of the court in allowing the plaintiff, G. B. Wood, to state whether or not he had seen anything wherefrom he could say that the sewer on Fourth street was too small to carry off the flow of water there. This evidence was objected to upon the ground that the witness was not an expert and therefore not competent to express an opinion upon the subject of inquiry.

This assignment of error is not tenable. The question did not call for an expression of opinion, and the testimony only

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related to a physical fact, namely, what the witness saw on the afternoon of the overflow, indicating that the sewer was too small to carry off the water.

The second bill of exception also relates to the testimony of the plaintiff, Wood; such evidence being objected to upon the ground that the witness was not an expert. Here again the witness was testifying to facts, and not giving expert testimony.

The third bill of exception is to the action of the court in permitting the witness, W. L. Smith, to testify as to the damage done to two out-buildings on the lot in question; it being contended that the declaration does not allege damage to out-buildings.

The declaration alleges that the sewer was so choked and obstructed that it would not carry off the water, and then says: "By reason whereof the said plaintiff says, that said water and sewerage so gathered and kept back as aforesaid entered into and upon certain property, to-wit, a lot of land with a dwelling thereon owned by the plaintiff," etc. The declaration concludes with the allegation, "the said plaintiff was otherwise greatly injured and damnified," etc.

We are of opinion that the declaration was broad enough to cover the damage done to all of the buildings on the lot. It says the damage was done by the water entering upon the lot, and does not specify what particular buildings suffered therefrom.

In the case of *Wrought Iron, &c. Co. v. Graham* (C. C. A.), 80 Fed. 474, the plaintiff alleged a negligent burning of his dwelling and an out-house. He was allowed to prove and recover for the destruction of shade trees not mentioned in the declaration.

If, however, the defendant was not sufficiently advised of the particulars of the damage sustained by the plaintiff by reason of the alleged overflow of his premises, and desired further information as to such particulars, he could readily

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have obtained the same under section 3249 of the Code, which provides, that "In any action or motion, the court may order a statement to be filed of the particulars of the claim, or of the ground of defense; and if a party fail to comply with such order, may, when the case is tried or heard, exclude evidence of any matter not described in the notice, declaration, or other pleading of such party, so plainly as to give the adverse party notice of its character."

The object of this section was to simplify and shorten pleading, by providing, that if the declaration or other pleading did not present distinctly the grounds or subject of the action, the plaintiff should, if required to do so, file such a statement of particulars as would put the defendant in possession of the character thereof. *City of Richmond v. Leaker*, 99 Va. 1, 37 S. E. 348; *Wood v. Am. Nat'l Bk.*, 100 Va. 306, 40 S. E. 931.

In the case last cited it is held that damages which are the necessary and probable result of the act of omission are termed general, and are legally imported and may be recovered, although not specially claimed in the declaration; that if a more specific statement of the elements of damages be desired, it may be demanded under the provisions of section 3249 of the Code.

The fourth bill of exception is to the action of the court in not allowing Jackson Bolton, shown to be a civil engineer of large experience, to answer the following question: After the witness had stated that he was familiar with the carrying capacity of sewers and the general causes of overflows, he was asked: "Applying that familiarity to the conditions out there on the date of this storm, what do you say was the difficulty?"

This witness was not shown to have had any familiarity with the conditions which caused the plaintiff's damage on the date of the storm. Before the opinion of an expert, when it is based on facts which he has not himself testified to, can be admitted, he must fully understand the facts already proved,

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and his testimony must come in response to a hypothetical question, which embodies the evidence.

In *Sebrell v. Burrows*, 36 W. Va. 212, 14 S. E. 996, it is held that in order to obtain the opinion of a witness on matters not depending on general knowledge, but on facts not testified to by himself, the witness must either be present and hear all the testimony, or the testimony must be summed up in the question put to him; and in either case the question is put to him hypothetically.

The fifth bill of exception is to the action of the court in refusing to allow Jackson Bolton, the assistant city engineer, to answer the following question: "Did that rain storm, which you say was heavy in that direction, indicate itself by many complaints of overflows of sewers in different sections of the city, indicating that it was very heavy in those different sections?" It is said on behalf of the city, that this evidence tended to prove that the rain storm was extraordinary, and was therefore admissible.

The court expressly allowed this witness to prove other overflows in the city as showing the extent of the storm. The question to which the objection was sustained did not ask whether there were other overflows. It asked whether there were complaints. The objection was properly sustained. Facts, not complaints, were admissible. Those who complained should have been brought to prove the facts upon which such complaints rested.

The sixth assignment of error is to the action of the court in giving instructions Nos. 1, 3 and 6, and in refusing an instruction asked for by the defendant.

Instruction No. 1 is objected to, because the court did not at the same time tell the jury that it was appropriate only to the evidence introduced in support of the allegations of the first count of the declaration.

This contention is without merit. The instruction properly

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stated the law applicable to facts which the plaintiff had pleaded and undertaken to prove. The court was not asked to tell the jury under what particular allegations the plaintiff had shown these facts, and under the circumstances here shown it was not required to do so.

Instruction No. 3 is objected to upon the ground, that "it does not fully and correctly propound the law entitling the plaintiff to recover."

Eleven instructions were given by the court, which must be read together. When so read, it is seen that the law applicable to the case was fully propounded, and without prejudice to the defendant. The instruction here objected to told the jury that if by a want of ordinary care the sewer in question became choked, and the plaintiff was damaged as a result thereof, the city was liable for such damages. This instruction further told the jury that if the condition of the culvert was the real and proximate cause of the injury, and that the culvert became choked because of the want of ordinary care on the part of the city, then the alleged extraordinary flood would not relieve the city from liability. These propositions are sound, and were applicable to the issues before the jury.

The objection to instruction No. 6 is also without merit. The only objection urged to this instruction is that the court interlined the words, "and not an ordinary flood such as might reasonably be expected in this locality and climate."

One of the questions at issue was as to the existence of an extraordinary flood at the time of the alleged damage. This instruction told the jury that the city was only bound to maintain its sewers in such manner as to meet ordinary conditions; that it was not bound for damages arising from overflows from its sewers caused by extraordinary falls of rain. It further told the jury that if they believed that at the time the damage alleged was sustained there was a great rainfall, out of the ordinary course of things, producing a great flood of water, "and not an ordinary flood such as might reasonably be ex-



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pected in this locality and climate," and that by reason of such extraordinary flood, etc., etc., they must find for the defendant.

The words underscored were properly interlined by the court for the purpose of submitting to the jury the question, whether there was an extraordinary flood. If, however, the interlineation by the court of the words objected to had been error, it would not have availed the defendant in this case, for the reason that instruction No. 10, which was asked for by the defendant, propounds, in the same words, the proposition of law announced by the interlineation objected to in the sixth instruction. A party cannot invite error and then be heard to complain. *B. & O. R. Co. v. Few's Ex'or*, 94 Va. 82, 26 S. E. 406; *Kimball & Fink v. Friend*, 95 Va. 125, 27 S. E. 901.

It is further assigned as error that the court erred in refusing to give the following instruction asked for by the defendant:

"The court instructs the jury, that under the pleadings and proof in this case the plaintiff is not entitled to recover any damages on account of injury to the improvements located on his real estate other than to the dwelling house."

This instruction was properly refused. It raised in another form the question already disposed of adversely to the defendant under the head of bill of exception No. 3. Apart from what is there said, this instruction is objectionable because it limits the recovery to the damage done to the dwelling house, whereas evidence *not objected to* shows that damage other than that to the dwelling and the out-buildings was sustained. To support this instruction the city must now, for the first time, attack the competency of this evidence. This it cannot do. *Norfolk Ry. & Light Co. v. Spralley*, 103 Va. 379, 49 S. E. 502.

The last bill of exception is to the action of the court in refusing to set aside the verdict as contrary to the law and the evidence. In this there was no error. The case was fairly

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**submitted to the jury, and the evidence was ample to sustain their verdict, especially when viewed, as it must be in this court, from the standpoint of a demurrer to the evidence.**

The judgment complained of must, therefore, be affirmed.

*Affirmed.*

## Statement.

**Richmond.**

## COMMONWEALTH AND ANOTHER v. CAMP MANUFACTURING CO.

January 14, 1909.

1. **TAXATION—*Standing Trees—Assessment in 1905—Act of March 17, 1906—Vansant v. Com'lt.***—A valid assessment for the taxation of trees, separate and apart from the land on which they stand, regularly made in 1905 by assessors appointed and acting under sections 441 and 472 of the Code, as amended by Acts 1889-90, p. 137, stands as the basis of taxation until the reassessment to be made in 1910, unless the legislature shall grant relief. The act of March 17, 1906, taking from commissioners of the revenue authority to assess standing timber trees separate and apart from the land did not affect the validity of a prior assessment regularly made by assessors. *Vansant v. Commonwealth*, 108 Va. 135 distinguished.
2. **CONSTITUTIONAL LAW—*Taxation—Standing Trees—Separate Assessment.***—The fact that the present Constitution requires the General Assembly to provide for the special and separate assessment of all coal and other mineral lands, and is silent as to any special assessment of standing timber, does not deprive the legislature of authority to make special assessments of standing timber. The legislature may authorize the assessment of standing trees as a part of the value of the land, or it may prescribe the method of valuation of land and the timber standing thereon separately, where the timber is owned by one person and the land by another.

Error to a judgment of the Circuit Court of Brunswick county on motions to be relieved from erroneous assessment of taxes. Judgment for the plaintiff. Defendants assign error.

*Reversed.*

The opinion states the case.

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*Wm. A. Anderson, Attorney-General and E. P. Buford, for the plaintiffs in error.*

*Edward R. Turnbull, Jr., for the defendant in error.*

CARDWELL, J., delivered the opinion of the court.

This writ of error brings under review two orders of the Circuit Court of Brunswick county, the one exonerating the defendant in error from the payment of taxes to the Commonwealth and levies to the county of Brunswick for the year 1906 upon standing merchantable timber trees, owned by the defendant in error, separate and apart from the surface of the land upon which they were standing; and the other exonerating the defendant in error from like taxes and levies upon standing merchantable timber trees for the year 1907.

These orders were predicated upon the view that there was no authority of law for the levy and collection of the taxes and levies in question upon standing merchantable timber trees, assessed separately from the surface of the land upon which they were growing, and to sustain that view the decision of this court in *Vansant, Kitchen & Co. v. Commonwealth*, 108 Va. 135, 60 S. E. 753, is greatly relied on.

In that case the opinion does say that, upon the passage of the act of March 17, 1906, all authority ceased to tax trees separate and apart from the land on which they stand; but it is not said that there was no authority for so taxing standing timber trees prior to the act just mentioned. On the contrary, what was said in the opinion had reference to the fact that by the act of March 17, 1906, the statutory authority for the assessment and taxation of standing timber trees by the commissioners of the revenue separate and apart from the land upon which they stand was repealed. The assessment called

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in question in that case was made by the commissioner of the revenue without any authority appearing in the record.

The question, therefore, presented in the case before us is, whether the assessments and levies complained of here were made without authority of law.

Section 171 of the present Constitution provided for a re-assessment of real estate in the year 1905, and every fifth year thereafter; and section 172 required the General Assembly to provide for the special assessment of coal and mineral lands.

Now, when the assessments here complained of were made, sections 441 and 472 of the Code of 1887, as amended by the Act of 1889-90, p. 137, were in force and effect.

Section 441, prescribing the duties of assessors appointed under section 437 in accordance with the requirements of section 171 of the Constitution, is as follows:

“The assessors shall, immediately after their appointment, proceed to examine all the land and lots, with the improvements thereon, within their respective counties, districts, and corporations and shall, upon such examination, ascertain and assess the cash value thereof, and at the same time shall note whether the owner is white or colored. In performing such duties the assessors shall be governed by and comply with the provisions of section four hundred and seventy-two of the Code of Virginia as if the same by its terms were made specially applicable to them.”

And section 472, as amended, is as follows: “If the surface of land is held by one person and the standing timber trees, minerals, mineral water, or oil under the surface be held in fee simple by another, the commissioner shall determine the relative value of each and shall assess the several owners with the value of their respective interests. If the surface and standing timber trees, minerals, mineral waters, or oil be owned by the same person the commissioner shall ascertain the value of the land, inclusive of the standing timber trees, minerals, mineral waters, or oil, and assess the same at such as-

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certained value. The commissioner shall make the assessment under the provision of chapter twenty-three."

These two sections plainly provided for the separate assessment and taxation of standing timber, and remained in force, without effort to amend or repeal them until December 10, 1903, when the legislature made the attempt to amend chapter 23 of the Code of 1887, for the reassessment of real estate in accordance with the general and special provisions of sections 171 and 172 of the present Constitution; and, among other things, in the attempted amendment of section 441, the words, "in performing such duties the assessors shall be governed by, and comply with, the provisions of section 472 of the Code of Virginia, as if the same by its terms were made specially applicable to them," added by the amendment of 1889-90, were omitted; and by another act of December 10, 1903 (Acts 1902-3-4, p. 643), the attempt was made, among other things, to repeal section 472, which, as will be noted, was the section prescribing the duties of the assessors where the surface of land was owned by one person and the minerals, etc., and standing timber trees by another; but both of these acts of December 10, 1903, failed of their passage by reason of the fact that they did not receive the vote required by the Constitution. See *Whitlock v. Hawkins*, 105 Va. 242, 53 S. E. 401. The result was that sections 441 and 472, as amended by the act of 1889-90, *supra*, remained the law in this State until the timber involved in this case, as we shall presently see, had been regularly assessed in the year 1905 and subjected to taxation under section 447 of the Code on the basis of that assessment.

Conceding, therefore, for the purpose of this case, that the act of March 17, 1906, repealed section 472 of the Code as amended by the act of 1889-90, *supra*, still, if there is no other legislation invalidating assessments made under the former statute (and we have been pointed to none), such an assessment remains valid and enforceable.

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In the answer filed on behalf of the Commonwealth and the county of Brunswick in this case, we find this statement: "That in the year 1905 the assessors appointed for the said county of Brunswick, in making the assessment of lands and lots within the said county, for the year 1905, as provided by law, determined the relative values of the lands on which the said timber trees were standing and of the said timber trees and assessed the several owners with the fair market value of their respective interests; that is to say, the said assessors assessed the owners of the said lands with the value of said lands exclusive of the said standing timber trees, and the said Camp Manufacturing Company with the value of said timber trees; and that the said timber trees, or the value thereof, are not otherwise assessed for taxation for State or county purposes." And we further find in the record the following agreed statement of facts signed by counsel for the respective parties to this controversy, to-wit: "It is agreed by the counsel for the parties hereto that the facts stated in the answer filed by the Commonwealth and the county of Brunswick are true, so far as they relate to the title of the Camp Manufacturing Company to the standing timber upon which the taxes mentioned in the notices of the motions have been assessed and levied; to the time and method by which the Camp Manufacturing Company became the owner of said standing timber; and to the separate listing, assessment and taxation of said timber from the surface of the land upon which the said timber is standing. In agreeing to the above facts, however, the counsel for the Camp Manufacturing Company does not admit any conclusion of law stated in said answer, but in so far as any conclusion of law is stated in said answer, he controverts the same."

Thus, we have a conceded state of facts, showing that while sections 441 and 472, as amended by the act of 1889-90, *supra*, were the law as to the duties of assessors, and authorized the separate assessment of standing trees, the assessment here in

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question was regularly made in the year 1905; that is, the defendant in error was assessed with the value of its interest in the standing timber, while the owners of the surface of the land were assessed with the value of the land, and the value of this standing timber was not when the regular assessment was made in 1905, otherwise assessed for taxation for State or county purposes. This assessment became the basis of taxation in the county of Brunswick in 1906 and thereafter; and accordingly the taxes and levies here in question for the years 1906 and 1907 were levied, the assessment having been made by an assessor regularly appointed under section 171 of the Constitution, and the statute conforming thereto and remaining in force; while in the case of *Vansant, Kitchen & Co. v. Commonwealth*, *supra*, the assessment was made by the commissioner of the revenue, but when does not clearly appear, and the taxation called in question based thereon.

The assessment made in that case was without authority, for the commissioner of the revenue had no power to make any assessment of standing trees separate and apart from the land, and such authority was never conferred upon a commissioner of the revenue until the act of February 21, 1906, which was repealed by the act of March 17, 1906.

In that case it also did not appear whether the value of the timber was included in the assessment of the land, while in the case here, as we have seen, on the agreed facts the assessment of the defendant in error's standing trees, regularly made in 1905, must be treated as valid, otherwise its interest in this standing timber must escape all taxation for at least the years 1906 and 1907.

The language of the statute prescribing the duties of the assessors appointed to make the assessment in 1905, and which was in force when the assessment here complained of was made, provided that the assessor, in performing his duties, should be governed by and comply with the provisions of section 472 of the Code, the language of which is clear and explicit as to his



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duties, namely: "If the surface of land is held by one person and the standing timber trees \* \* \* be held in fee simple by another \* \* \* (he) shall determine the relative value of each, and shall assess the several owners with the value of their respective interests."

The statutes in force in 1905, when the separate assessment of the timber in this case was made, were in their force and effect preserved by section 1 of the schedule of the Constitution, which provided that the common law and the statute law, so far as not repugnant thereto, or repealed thereby, should remain in force until they expired by their own limitation, or were altered or repealed by the General Assembly. The property of the defendant in error having been listed and assessed in 1905 pursuant to the statute then in force, we know of no principle upon which the assessment so made does not furnish the proper basis for taxation for 1906 and 1907.

No such question arose in the case of *Vansant, &c. v. Commonwealth, supra*, and while the opinion in that case correctly stated that upon the passage of the act of March 17, 1906, all authority ceased to tax trees separate and apart from the land upon which they stand, meaning upon an assessment made by a commissioner of the revenue, there is nothing whatever in the opinion having the effect to invalidate or discredit assessments of standing trees theretofore regularly made by authority of law, and the act of March 17, 1906, affected the method of assessing standing timber separate and apart from the land, even by the commissioners of the revenue, only prospectively, and did not affect the validity of an assessment regularly made in 1905 by assessors appointed and acting under sections 441 and 472 of the Code, as amended by the Acts of 1889-90, *supra*. There is nothing in the act itself evincing a purpose on the part of the legislature to invalidate any previous assessment; on the contrary, the real purpose of the act was to validate previous assessments. Not having evinced a purpose to invalidate prior assessments by the act of March 17, 1906, it

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is needless to discuss the question, whether the legislature had the power, if it had so intended, to invalidate assessments so as to relieve timber owners from the payment of taxes for the five years next following 1905, and thereby create an exemption from taxation, in violation of the express provision of section 183 of the Constitution.

"But in general, when a tax system is revised, with a repeal of the former law, it is safe to assume that the legislative intent is that the new enactment shall be of prospective force only, and shall not disturb existing valid assessments." Cooley on Taxation (3rd ed.), pp. 21-22.

In support of this statement, the case of *Warren R. Co. v. Belvidere*, 35 N. J. L. 587, is cited, in which, speaking of a tax law which was repealed after the tax was laid, it was said: "Such repeal does not affect the tax assessed. That was a matter closed by the assessment, and besides has been concluded by final judgment since the repeal." In that case, the collection of the tax was provided for, not by the law which was repealed, but by a general law which remained in force.

The case of *State v. Waterville Savings Bank*, 68 Maine, 515, was also cited. In that case an assessment for which an action was given was held to remain collectible, notwithstanding the repeal of the statute under which it was laid. See also *Smith v. Auditor General*, 20 Mich. 398.

It is argued that to uphold the tax in this case, upon the record presented, would be to require standing timber trees in the county of Brunswick and one adjoining county to bear a burden of taxation when standing timber trees in other counties of the State would escape taxation.

We are unable to see the force of this contention. The hardship would come, as it would seem, upon the tax-payers of other counties whose lands have doubtless been assessed upon a valuation including the standing timber thereon, and are being regularly taxed year by year upon that assessment, while not so in the county of Brunswick; and if defendant in error could

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be relieved of the taxes of which it here complains, it would escape taxation upon its valuable property in that county until another assessment thereof is made under authority of law.

Counsel for defendant in error further argues, that as the former Constitution did not expressly authorize it, and section 172 of the present Constitution requires the General Assembly to provide for the special and separate assessment of all coal and other mineral lands, and does not authorize a special assessment of standing timber, the conclusion is inevitable that the legislature had no constitutional authority to amend section 472 of the Code so as to authorize the separate assessment of standing timber; but we are unable to see the force of this contention. The provision of the Constitution which is referred to further provides that, until such special assessment is made, the land shall be assessed under general laws. The special assessment therein referred to and provided for does not necessarily exclude the assessment of standing trees as a part of the valuation of the land upon which they stand, and there can be no conceivable reason why the legislature may not, as it did by the amendment to section 472 of the Code, prescribe the method of the valuation of land and the standing timber thereon separately, where the timber was owned by one person and the land by another. We can see nothing in the present or former Constitution which inhibits the legislature from making such a provision.

When the legislature by its act, approved March 12, 1908—Acts 1908, p. 331—provided, as did the act of February 21, 1906, repealed by the act of March 17, 1906, for an assessment by the commissioners of the revenue of the several counties, at shorter intervals than five years, of standing merchantable timber trees separate and apart from the land upon which the trees are standing, where the timber trees are owned by one person and the surface of the land by another, it was not, as counsel for defendant in error contends, in recognition of the fact that there was no authority of law for such an assess-

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ment, but was merely intended to change the agency of the State to make the assessment and the duration thereof as the basis of taxation. There is not a word in that statute to indicate a purpose to invalidate an assessment made as in this case, and hence the statute has no bearing upon the question we are considering.

Upon the whole case, we are of opinion that, as the assessment complained of was validly made in 1905 and the assessment stands as the basis of taxation until the reassessment to be made the fifth year thereafter, namely, 1910, unless the legislature in the exercise of its power shall see fit to relieve the defendant in error and others similarly situated from taxation based upon that assessment, the judgment of the circuit court complained of is wrong and must, therefore, be reversed, and this court will enter such judgment as the circuit court should have entered, dismissing the petitions of the defendant in error, with costs to plaintiffs in error.

*Reversed.*

## Statement.

**Richmond.**

## EGGBORN v. BOARD OF SUPERVISORS OF CULPEPER COUNTY.

January 14, 1909.

1. ELECTIONS—*County Bonds—Roads—Disqualified Voters.*—If residents and voters in a town exempt from road tax are allowed to vote indiscriminately with other residents of the magisterial district in which the town is located at an election held under the act of March 8, 1908. "to provide for the issuing of county bonds for permanent road improvement in the magisterial districts of the counties of the State" (Acts 1906, p. 105), which contains a proviso, "that no voter shall be allowed to vote in said election who resides and is a voter in a town exempt from road-tax," such election is void, as it is not held agreeably to the mandates of the statute.
2. ELECTIONS—*Mistake—County Bonds.*—Where a bond issue is voted by all the voters in a magisterial district, which embraces an incorporated town, on the theory and in the belief that the town was to participate in the benefits and bear a corresponding portion of the burden of the bond issue, and this theory and belief turn out to be erroneous, the election should be set aside and the bond issue annulled.
3. CONSTITUTIONAL LAW—*Taxation Without Right to Vote—Permanent Roads—County Bonds—Acts 1906, p. 105.*—The act of March 8, 1906, "to provide for issuing county bonds for permanent road improvement in the magisterial districts of the counties of the State," denies to voters residing within a town which is exempt from road-tax the right to vote at elections held under the act. The act further provides that "a tax shall be levied on all property liable to State tax in such magisterial district. *Quære:* Are these features of the act repugnant to section 6 of the Constitution so far as it affects citizens of a town which lies within a magisterial district, and is exempt from road-tax?

Appeal from a decree of the Circuit Court of Culpeper county. Decree for defendant. Complainant appeals.

*Reversed.*

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The opinion states the case.

*Grimsley & Miller*, for the appellant.

*Edwin A. Gibson* and *T. Morris Wampler*, for the appellee.

WHITTLE, J., delivered the opinion of the court.

This appeal is from a decree dismissing the bill filed by the appellant, E. J. Eggborn, a resident and tax-payer of the town of Culpeper, to enjoin the appellee, the Board of Supervisors of Culpeper county, from issuing or disposing of \$60,000 of bonds executed for the purpose of macadamizing and permanently improving the public roads of Catalpa district in that county. The bill contains the alternative prayer, that if the court should be of opinion that the bonds might lawfully be issued, then that it would declare the persons and property within the corporate limits of the town of Culpeper (which constitutes a part of Catalpa district) exempt from the tax imposed for their payment, and enjoin the board of supervisors from levying any part of such tax upon them or their property.

The proceeding sought to be enjoined was had under an act approved March 8, 1906, "to provide for the issuing of county bonds for permanent road improvement in the magisterial districts of the counties of the State." Acts 1906, p. 105.

On the petition of the board of supervisors, the circuit court directed the opening of a poll to take the sense of the qualified voters of the county on the question, whether the board should issue bonds to an amount not exceeding \$60,000 for the purpose of macadamizing certain designated roads in Catalpa district.

The order likewise contains the following provision: "For

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the purpose of this order the residents of the town of Culpeper and the property located within the corporate limits thereof, said town being a part of Catalpa magisterial district, shall be held liable to taxation for the payment of said bonds, should they be issued, notwithstanding that said town may keep its streets in order, and said residents be exempted from ordinary road tax by reason thereof. Provided, however, that a separate poll shall be opened for the purpose of taking the sense of the qualified voters of said town on the question herein directed to be submitted."

After the entry of the foregoing order, it was agreed between the council of the town and the board of supervisors, that the council would waive the exemption relieving the property within the town from taxation, provided, the board would devote a part of the proceeds of the bonds to macadamizing certain of its streets.

At the election held by order of the court, no separate poll was opened for the voters of the town, as directed by the order; but the judges of election of Catalpa precinct, which is the regular precinct for the voters of the entire district, received and deposited in one ballot-box all votes cast at that precinct, whether the voters resided within or outside the corporate limits of the town.

The election resulted in the requisite majority "for bond issue." Nevertheless the agreed facts show that a large number of persons were influenced to vote for the issue of the bonds on the supposition that the property in the town (which composed more than one-half of the taxable values of the entire district) was liable to taxation along with the other property of the district for the payment of the bonds.

At the hearing of the cause, the circuit court held that the proposed bonds were valid, and that the property within the town was ratably subject to taxation for their payment, and decreed accordingly.

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The town of Culpeper is a municipal corporation, duly chartered under the laws of the State, and section 37 of the charter declares, that the persons and property within the town shall be exempt from road-tax so long as the town shall, at its own expense, keep its streets in order, a requirement with which it has long complied.

It is insisted by the appellee, however, that the exemption must be construed with reference to the ordinary district road tax, existing at the date of the charter, for working and keeping in order and repairing the public roads and bridges in the district; and not to the establishment and permanent improvement of public roads as contemplated by the act of March 8, 1906, by virtue of which this proceeding was had. But the argument in favor of the suggested limitation with respect to the exemption loses its cogency when considered in the light of the proviso found in section 19 of the last named act, namely, "that no voter shall be allowed to vote in said election who resides and is a voter in a town exempt from road tax."

It will be observed that the action of the circuit court in directing a poll to be opened to take the sense of the voters of the town on the question of bond issue utterly ignores the foregoing provision.

Nor can we agree to the proposition, that the bond issue is valid though the property of the town should be held to be exempt. The order of the court and the agreed facts both show that the poll was held and the vote cast on the theory and in the belief that the town was to participate in the benefits and bear a corresponding portion of the burdens of the bond issue. These salient features of the transaction are so correlated, both by the order of the court and the action of the voters in pursuance thereof, as to be inseparable, and they must stand or fall together.

The election was not held agreeably to the mandatory requirement of the statute, and for that reason was illegal and the bond issue invalid.



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The decree appealed from is, therefore, erroneous; and this court will enter such decree as the circuit court ought to have entered declaring the election under and will enjoin the appellee from disposing of the bonds.

NOTE.—There is a question involving the constitutionality of the act which was not raised in the case and upon which we express no opinion, to which, however, attention ought to be called.

As we have seen, section 19 denies to voters residing in the town the right to vote in such election; nevertheless, section 24 provides, that “a tax shall be levied on all property liable to State tax in such magisterial district” to pay the interest on the bonds and to create a sinking fund to retire the principal at maturity.—*Quære*: Are these features of the act repugnant to section 6 of our bill of rights, which declares: “That all elections ought to be free; and that all men, having sufficient evidence of permanent common interest with, and attachment to, the community, have the right of suffrage, and cannot be taxed, or deprived of, or damaged in their property for public uses, without their own consent, or that of their representatives duly elected, or bound by any law to which they have not, in like manner, assented for the public good?”

*Reversed.*

## Statement.

**Richmond.**

EPES v. SAUNDERS AND OTHERS.

January 14, 1909.

Absent, Keith, P., and Cardwell, J.

1. VENDOR AND PURCHASER—*Sale by the Acre—Presumption.*—If parties enter into an agreement for the payment of a gross sum for a tract of land, upon an estimate of a given number of acres, there is a presumption that the quantity influences the price to be paid, and that it is a sale by the acre, and not a sale in gross, unless the contract plainly indicates a sale in gross, and this presumption can only be overcome by clear and cogent proof.
2. VENDOR AND PURCHASER—*Estimation of Quantity—Sale by Acre—Mistake—Case in Judgment.*—If a vendor sells to a purchaser a boundary of land "said to contain" seventy-five acres, at a gross sum, this statement, while not amounting to a positive affirmation of quantity, is a representation that the boundary contains that number of acres, and upon that representation the purchaser has the right to rely. If there is no other evidence of a sale in gross except the conflicting statements of parties equally entitled to credit, and there turns out to be a deficiency in the quantity, the purchaser is entitled to recover back the price paid for the deficiency. It is a case of mutual mistake. In the case in judgment, it does not clearly and cogently appear that the sale was in gross, and not by the acre.

Appeal from a decree of the Circuit Court of Mecklenburg county. Decree for defendants. Complainant appeals.

*Reversed.*

The opinion states the case.

Wm. H. Mann, for the appellant.

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*McGuire, Riley & Bryan* and *W. E. Homes*, for the appellees.

BUCHANAN, J., delivered the opinion of the court.

The principal question to be determined in this case is whether or not the tract of land sold and conveyed by the appellees to the appellant was a sale by the acre or a sale in gross.

It is well settled in this State that where persons enter into an agreement for the payment of a gross sum for a tract of land, upon an estimate of a given number of acres, there is a presumption that the quantity influences the price to be paid, and that it is a sale by the acre and not a sale in gross, unless the contract plainly indicates that it is a sale in gross, and this presumption can only be overcome by clear and cogent proof. *Blessing v. Beattie*, 1 Rob. 287; *Watson v. Hoy*, 28 Gratt. 698, 705; *Benson v. Humphreys*, 75 Va. 196, 199; *Boshen v. Jurgens*, 92 Va. 756, 24 S. E. 390; *Berry v. Fishburn*, 104 Va. 459, 51 S. E. 827.

In December, 1905, the appellant wrote to Mrs. Saunders, one of the appellees, to know if she would sell her tract of land situated near the town of Blackstone, and if so, her price and the number of acres in the tract. Her reply to that letter was as follows: "I will sell my place near Blackstone, either in part or as a whole, said to contain seventy-five acres. Am willing to sell on terms you mention in your letter. Have been offered \$2,500.00 for it. I am ignorant of prices of land in your locality, but if it was near this town (Chase City) it would bring \$75 to \$100 per acre."

Upon the receipt of that letter, the appellant prepared an option contract running for three months, in which he offered \$2,500 for the land, which was described as containing seventy-five acres, more or less, and sent it to Mrs. Saunders. After inserting in that paper \$2,750 instead of \$2,500 as the pur-

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chase price, and the words "said to contain" instead of "containing" just preceding the words "seventy-five acres, more or less," she copied, signed the copy and sent it to the appellant.

In March following, he wrote to her that he would take the property, and requested her to have a deed prepared. After some correspondence as to the mode of securing the deferred purchase money in order to avoid giving a deed of trust to secure its payment, he agreed to pay and did pay the whole of the purchase price of the land in cash, and received a deed therefor, prepared, signed and acknowledged by the appellees, in which the land is described as "containing seventy-five acres, more or less."

In April following, the appellant had the land surveyed and found, as he alleges in his bill, and as appears from a plat of the survey filed with it, that the tract, after deducting one-half an acre previously sold off of it by Mrs. Saunders, and six and six-tenths acres condemned for railroad purposes, only contained fifty-two and nine-tenths acres.

The appellant immediately wrote to Mrs. Saunders of the deficiency, stating that she had represented to him that the tract contained seventy-five acres. Mrs. Saunders denied in her reply that she had made any such representation and stated that she had sold the land by the boundary and not by the acre. In a few months afterwards this suit was brought by the appellant to recover compensation for the alleged deficiency.

When Mrs. Saunders, in her reply to the appellant's letter asking if she would sell the land, and if so, her price and the number of acres in the tract, stated that the tract was "said to contain" seventy-five acres, she either thought it contained that number of acres or she intended to mislead the appellant as to the quantity. She states in her deposition that by the use of the words "said to contain" she meant "supposed to contain." The presumption is that she did not intend to mislead the appellant into thinking there was seventy-five acres of

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land in the tract, and no one can read the record without reaching the conclusion that she honestly supposed, though she had no actual knowledge of the acreage, that the tract did contain that quantity of land. And it is equally clear, we think, from the record, that the appellant thought the same when the contract was made. Mrs. Saunders' statement "said to contain" did not amount to a positive affirmation of quantity, but it was a representation as to quantity upon which the appellant had the right to rely. *Caldwell v. Craig*, 21 Gratt. 132, 140-1.

In the case cited, which is much relied on by counsel for appellees, the agreement of sale described the land as "supposed to contain 1,000 acres, more or less." In discussing the language of that agreement, Judge Staples, who delivered the opinion of the court, on pages 140-1, says: "No doubt he (the vendor) 'supposed' the tract to contain the number of acres mentioned, and the defendant (the vendee) honestly believed the same; and each was influenced, doubtless, by this estimate in fixing the price to be paid. And if this were all the transaction would present a clear case of mutual mistake requiring the intervention of a court of equity in behalf of the injured party. For it is well settled that the employment of the words 'more or less,' or 'containing by estimation so many acres, more or less,' will not relieve the vendor or vendee, as the case may be, from the obligation to make compensation for an excess or deficiency beyond what may be reasonably attributed to small errors from variations of instruments or otherwise, unless indeed there be evidence to show that a contract of hazard was intended. In the absence of such evidence, it is to be presumed that the parties contract with reference to quantity. It is an important element in every agreement and *prima facie* must be intended to have influenced the price. It is, however, a mere presumption, which may be met and overthrown by proof that the parties agreed to be governed at all events, by the estimated quantity."

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In that case, the parol proof, which consisted chiefly of the admissions of the vendee, that the sale was by the boundary or in gross and not by the acre, satisfied the jury, and in the opinion of the court was sufficient to justify them in finding that the parties entered into a contract of hazard.

In this case, the only oral testimony upon this question is that of Mrs. Saunders and the appellant. She testifies that it was intended to be and was a sale by the boundary or in gross, and the appellant deposes that it was a sale by the acre. They are equally positive in their statements, and, so far as the record shows, are equally credible, so that no aid can be derived from their testimony upon this question. It must, therefore, be determined from the written evidence in the cause, and the facts and circumstances surrounding the parties when the sale was made.

The force and effect of the writings bearing upon this question have been considered. Without discussing in detail the other evidence, it is sufficient to say that, after a careful examination and consideration of all the evidence in the case, both written and oral, it does not *clearly and cogently appear* that the sale was in gross and not by the acre, and that the circuit court erred in so holding.

It is insisted that the record does not show that there is any deficiency in the land, and that the action of the court in dismissing the bill should be sustained on that ground.

It is alleged in the bill that there is a deficiency of 22 1-10 acres, as ascertained by survey which is filed with the bill as an exhibit. There is a general but no specific denial of this allegation in the answer of the appellees. They state in it that they know nothing of the accuracy and correctness of the survey referred to in the bill and are not bound or affected by it. The appellant proves that the engineers who made the survey are reputable and competent surveyors. The appellees took no proof to show that the tract of land contained 75 acres,

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or that the survey showing the deficiency was not correct. That there was less land in the tract sold than seventy-five acres does not seem to have been really controverted in the circuit court. There the only question in dispute was, whether the sale was by the acre or in gross.

The record shows, we think, *prima facie* at least, that there is a deficiency in the land as claimed in the bill.

In order, however, that no injustice may be done, this court will reverse the decree complained of and remand the cause to the circuit court, with directions that if the appellees desire it the court shall order another survey of the tract to be made and ascertain the deficiency, if any, and for such further proceedings as may be proper, not in conflict with the views expressed in this opinion.

*Reversed.*

Statement.

**Richmond.**

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED  
STATES v. KITTS' ADMINISTRATOR.

January 14, 1909.

1. **VERDICTS—Credibility of Witness—Jury Sole Judges—Appeal and Error—Case at Bar.**—The jury are the sole and final judges of the credibility of witnesses. So long as a witness testifies to facts which, if true, are sufficient to maintain the verdict, the fact that his credit is impeached by an attack upon his character, or by contradictory statements—especially conflicting statements made out of court—affects only his credibility, and goes to the weight and sufficiency of his testimony, not to his competency. If the jury, in their discretion, see fit to base their verdict upon his testimony, and the trial court refuses to disturb that verdict, there can be no relief in an appellate court. In the case at bar, the verdict in the main rests upon the testimony of a witness who shifted his position without hesitation, whose statements as a witness were contradicted by his letters written during the progress of negotiations concerning the policy of insurance which is the subject of litigation, and who was seriously discredited throughout the trial, and yet the jury have seen fit to credit him, and the trial judge has approved their verdict. Under such circumstances, the verdict cannot be disturbed in this court.

Error to a judgment of the Circuit Court of Tazewell county in an action of *assumpsit*. Judgment for the plaintiff. Defendant assigns error.

*Affirmed.*

The opinion states the case.

*Henry & Graham*, for the plaintiff in error.

*Greever & Gillespie, J. N. & J. W. Harman*, for the defendant in error.



## Opinion.

KEITH, P., delivered the opinion of the court.

Frank D. Kitts, as administrator of James M. Kitts, recovered a judgment in the Circuit Court of Tazewell county for the sum of \$2,000, upon a policy issued by the Equitable Assurance Society upon the life of James M. Kitts, deceased; and to that judgment a writ of error was issued by this court, upon the petition of the defendant.

Errors are assigned to the rulings of the court upon the demurrer to the declaration, upon the admissibility of evidence, upon the instructions given to the jury, and to the refusal of the court to set aside the verdict as contrary to the evidence.

The evidence is of a very unusual character. The case in the main will be found to rest upon the testimony of a witness, who was the agent upon the part of the insurance company to solicit insurance, who was the son of the person insured, and who has, since his death, become his administrator. These facts of themselves are sufficient to excite caution as to the weight to be given to his testimony.

It will appear, when his testimony comes to be considered, that he shifts his position without hesitation; that what he asserts as a witness is contradicted by his letters, written during the progress of the negotiation; and it is difficult to conceive how greater discredit could have been thrown upon him as a witness than will be disclosed by this record; and yet the jury have seen fit to give credit to his testimony, and they are the final judges of the credibility of witnesses.

When the law says that it is for the jury to judge of the credibility of a witness, it is not a matter of degree. So long as a witness deposes to facts which, if true, are sufficient to maintain their verdict, then the fact that his credit is impeached by an attack upon his character, by contradictory statements—especially when it is sought to contradict his testi-

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mony by conflicting statements made out of court—affects only his credibility, and goes not to his competency but to the weight and sufficiency of his testimony. If the jury, in their discretion, see fit to base their verdict upon his testimony, and the trial court refuses to disturb that verdict there can be no relief in an appellate court.

We have stated an extreme case, but a case which in our judgment is fully sustained by the great weight of authority.

The facts which the evidence tends to prove, subject to the jury's opinion as to the credibility of the witness, are as follows: Frank D. Kitts was the agent of the Equitable Society, at Tazewell, Va. As such agent he sent in the application of James M. Kitts for a policy of insurance upon his life for the sum of \$2,000. This policy is dated October 24, 1904; was sent to a Mr. Steiner, who was the general agent of the company at Roanoke, Va., who transmitted it in due course to Frank D. Kitts, the local agent, who informed his father, the insured, that the policy had arrived. In a day or two after the receipt of the policy, he received from his father the sum of \$20, and the policy was delivered. James M. Kitts, the father, upon receipt of the policy, handed it to his son with instructions to put it in his safe for safekeeping along with other papers belonging to the father. At the time of this transaction it was agreed between the father and the son, the agent and the insured, that the balance of the premium should be paid at a future day. Kitts, the agent, sent Steiner a check for the \$20 which he had received, and that check is in evidence and states on its face that it is in "part payment on life policy 1,384,238, J. M. Kitts, Equitable," and is made payable to H. H. Steiner, general agent; and on its back is endorsed "H. H. Steiner, Gen'l Agt. For deposit to the credit of H. H. Steiner, Gen'l Agt."

On the 23rd of November, 1904, Steiner informed Kitts by letter that his stenographer had made a mistake when he

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had told Kitts that he would be entitled to a commission of *fifty per cent.* upon the premium on this policy. The entire premium was \$79.76, upon which Kitts thought, in consequence of what he had been told by Steiner's stenographer, that he would be entitled to a commission of *fifty per cent.*; whereas, he was entitled only to a commission of *ten per cent.* upon a non-participating policy such as the one issued in this case. Steiner, therefore, demanded the balance due upon the premium after the payment of the \$20, which was \$51.78.

To this Kitts replied on the 12th of December: "I am returning above policy to you by to-day's mail, as I was under the impression when I made out the application that there was at least 40 *per cent.* commission in it. Will thank you to return check by first mail."

To this demand for the return of the check, Steiner replied on December 17, 1904: "Replying would say that before taking action on this policy I will await the result of your interview which you told me personally you were going to have in regard to this contract. . Please advise me at once in regard to it so that I can take up the matter of return of premium paid by you."

December 19, Frank D. Kitts replied to this communication as follows: "Beg to advise that I have had a talk with the above assured (meaning his father, Jas. M. Kitts,) and he states that he is not willing to make balance of payment and will thank you to return check less examination fee."

To this Steiner replied on December 23: "I am taking up the matter with the home office to-day relative to the return of the part premium paid by you. I will advise you in due course as to this matter."

On January 12, a letter was written to Steiner by A. W. Maine, associate auditor of the company, as follows: "We notice your statement that you collected \$20.00 on account premium, and that the assured says he cannot pay the balance, but

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is willing to pay the medical fee; also your enquiry as to whether the assured should be charged term rate, and we would inform you that the concession of allowing a policy to be returned as N. T. O. (not taken out) and settled for on a term rate basis, is a privilege which in certain cases is extended to an agent in order to reduce his loss, say where a note is taken which cannot be collected, and it is not to be understood that an assured may be permitted to settle for his policy other than on the basis as issued. Besides, the *pro rata* premium for the time the policy has been in force, plus the medical fee, would exceed the amount collected from the assured. We are willing to allow this policy to be marked off your account on the payment of the medical fee and \$15.00 as premium for which we allow you the same rate of commission as provided in your contract on the policy as issued, we being furnished with a letter from the assured, if the same is obtainable, stating that the amount paid by him is to apply toward the cost of carrying this policy for the time it was in force." (Signed) "A. W. Maine, associate auditor."

Upon the receipt of this letter, Steiner, on the 14th of January, 1905, wrote to F. D. Kitts as follows: "I beg to hand you copy of a letter just received from the home office relative to this case. You can see from this explanation that there will be practically no refund on this case under the ruling of the society. You will also note from the letter that they agree to allow the same rate of commission as allowed on the regular policy which would be \$1.50, \$15.00 being the premium. I will be very glad to send you a check for this amount if you will obtain for me a letter stating that the amount paid by the assured is to apply toward the cost of carrying this policy for the time it was in force.

"You will readily see, Mr. Kitts, the justness of the position taken by the Equitable in this case, as this policy has been in full force and effect from the time it was delivered to you until action was taken on it at the home office on January

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12, and the society must be paid for carrying the risk for that length of time."

To this letter Kitts replied on the 16th of January, 1905: "I have your favor relative to cancelled policy No. 1,384,238, Kitts, and advise that I am surprised at the action taken by the company. The policy never was in force and was not delivered to assured. I feel just this way about it: If the company proposes to keep the \$15.00, the amount is so small that I have no way to get at them and I consider it a very dirty piece of business on their part. There was a misunderstanding as regards the commission as you well know. I am sure the policy was not in this office but a short time and during that time I was corresponding with you as regards the commission. If the company is so little as to keep the \$15.00 they can do so, but it will be the last cent they will ever get from me, and I will do everything in my power to show up their dirty way of doing business. Now they can do just as they please, but you know everybody has some influence."

Kitts wrote again on January 24th: "We have your favor of recent date and notice the Equitable refuses to allow a return premium of \$15.00 under the Kitts policy. Now this policy was never in the hands of the assured, and as there was a misunderstanding as regards the commission, of which fact you are well aware, we do not see why the Equitable should not return the \$15.00. There was no liability on the company's part for the reason that policy was never in the hands of the assured. We trust you will see that the return premium of \$15.00 is paid to us at once."

On January 30, 1905, Steiner writes from Roanoke: "On my return to the city this morning after a week's absence, I found your favor of the 24th instant, and immediately forwarded same to the home office for their attention. I will advise you as soon as possible as to their decision in the matter, which I trust will be satisfactory to you."

The next letter is the one of February 15, 1905, as follows,

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written by A. W. Maine, the associate auditor: "We should be pleased to do anything permissible in this case in order to accommodate you and shall make you the out-and-out concession of allowing a settlement on a term rate basis, with the understanding that it shall not affect the usual rule. We would also state that it should be understood that any payments made by assured belong to the society and are not held subject to his option or the agent's as to the disposition to be made of same. We make the term rate for say 2 months, \$5.00. Please furnish us with the statement referred to in the fifth paragraph of the N. T. O. form."

Now we approach the *denouement*. On February 17, 1905, Frank D. Kitts addressed the following note to H. H. Steiner: "I beg to advise that the assured under the above number has recently died. During his life time I tried to secure the proper return of premium from you under this policy, but as yet you have made no return; furthermore, there has been no release on the part of the assured, hence, we will ask you to give this matter prompt attention."

And the same day Frank D. Kitts addressed the society, at New York, as follows: "Kindly advise me the status of policy No. 1,384,238—James M. Kitts, if the first premium has been paid."

To this inquiry an answer was addressed to Frank D. Kitts, care of H. H. Steiner, Roanoke, on February 23, 1905: "We acknowledge receipt of your favor of the 17th instant relative to policy No. 1,384,238, issued by this society upon the life of James M. Kitts, and in reply beg to say that according to our records this policy was returned for cancelation, no premium having been paid upon it." Signed "Recorder" without any name.

And the correspondence is closed by a letter addressed to F. D. Kitts, as follows, dated June 5, 1905: "I beg to inclose you herewith check to your order for twenty dollars (\$20.00),

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being the amount deposited with Mr. Steiner in connection with policy No. 1,384,238—Kitts. Kindly acknowledge receipt of the enclosed check, and oblige. Very truly yours, P. G. Allison, cashier."

It appears from this correspondence that down to the date of the death of James M. Kitts, the plaintiff in this action, who is the administrator of the assured, and was at the same time the agent of the insurance company, was earnestly asserting that the policy had never been delivered; that it was never in force; that it was not binding upon the company; and was demanding a return of the partial payment which he had made upon it. On the other hand, the insurance company was insisting that the policy had been delivered; that it was in force from the time it was issued until the 12th day of January; refused the demand for the return of the partial payment; and insisted upon its right to deduct from that payment a term rate for the period during which the policy had, according to the contention of the company, been in force.

Upon the death of the assured, which took place on the 13th of February, 1905, both parties executed a "right-about-face," and from that moment Mr. Frank D. Kitts asserted that the policy had been delivered; that all he had said in his letters was untrue; that his father was in complete ignorance of his action; that the old man had gone to his grave with the full belief that the policy was locked up in the safe in his possession and under his control; while the insurance company, on the other hand, turned about and claimed, that the policy never had been delivered; that the company never had been responsible; and returned the premium with respect to which the correspondence had taken place, which has been set out in this opinion.

Now these facts are substantially set out in the declaration. The admissibility of this evidence is in certain particulars excepted to by the plaintiff in error. It is made the basis of

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certain instructions, which are also excepted to, and its probative force is called in question by a motion to set aside the verdict as contrary to the evidence.

Without going into a detailed discussion of these various assignments of error we shall content ourselves with saying that the declaration sets out a good cause of action, from which it plainly appears that the company, with knowledge of all the facts, acquiesced in a delivery of the policy. Upon a demurrer, of course, all the facts properly pleaded in the declaration are taken as true. Those facts are then established by testimony which is admissible and sufficient, if the witness is to be believed, and the law was fairly put before the jury in the instructions. The credibility of the witness was solely a matter for the jury, and they have seen fit to accept what he states as true. It presents, as we have before said, a most remarkable state of facts, but one under which the court does not feel that it can with propriety disturb the verdict of the jury, which has been approved by the trial court.

The judgment must, therefore, be affirmed.

*Affirmed.*



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**Richmond.**

FINCH AND OTHERS V. GARRETT.

January 14, 1909.

Absent, Cardwell, J.

1. RESCISSION—*Fraud—Laches—Case in Judgment.*—If a party intends to repudiate a contract on the ground of fraud, he should do so as soon as he discovers the fraud. If, after the discovery of the fraud, he treats the contract as a subsisting obligation, he will be deemed to have waived his right of repudiation. Prompt action is essential when one believes himself entitled to a rescission of a contract. In the case in judgment, the appellee, with full knowledge of all the facts, acquiesced in his contract and enjoyed its benefits for years with no intimation that he had been deceived or defrauded, and hence cannot now have the same rescinded.

Appeal from a decree of the Circuit Court of Newport News.  
Decree for complainant. Defendants appeal.

*Reversed.*

The opinion states the case.

*S. O. Bland* and *Wm. C. Stuart*, for the appellants.

*Ashby & Read*, *B. A. Lewis* and *W. W. Woodward*, for the appellees.

HARRISON, J., delivered the opinion of the court.

By deed dated November 15, 1899, F. F. Finch and M. A. Finch, his wife, leased a certain lot in the city of Newport

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News, the property of the female lessor, to the appellee, A. C. Garrett, his executors, administrators and assigns, for the term of forty years, ending on the 15th day of November, 1939. In September, 1906, nearly seven years after the date of the deed of lease, the lessee filed the bill in this case, asking for a rescission of the lease, upon the ground that he had been induced to enter into the contract by the false representations of the lessors and their agent, one W. I. Fitzsimmons.

There was a demurrer to the bill, which was overruled by this court in June, 1907. *Garrett v. Finch*, 107 Va. 25, 57 S. E. 604. For the terms of the lease in question, and the allegations of false representations relied on, see the opinion of this court in the case cited.

In the view we take of the case, it is not necessary to consider how far, if at all, the alleged false representations have been sustained by the evidence taken since the case was formerly on this docket. Consideration of these questions is obviated, because the record abundantly shows that the appellee has been guilty of such acquiescence in the contract of lease, and laches in bringing this suit for rescission, as to preclude him from the relief sought.

It is an established doctrine that, when a party intends to repudiate a contract on the ground of fraud, he should do so as soon as he discovers the fraud. If after the discovery of the fraud he treats the contract as a subsisting obligation, he will be deemed to have waived his right of repudiation. Prompt action is essential when one believes himself entitled to a rescission of a contract. *Mar Meadows, &c. Co. v. Brady*, 92 Va. 71, 22 S. E. 845; *Hudson v. Waugh*, 93 Va. 518, 25 S. E. 530; *Hurt v. Miller*, 95 Va. 32, 27 S. E. 831; *West End Co. v. Claiborne*, 97 Va. 734, 34 S. E. 900; *Campbell v. Eastern Bldg. Asso.*, 98 Va. 729, 37 S. E. 350.

In the case at bar, it amply appears, that with full knowledge of all he now claims as fraud, the appellee continued for

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a number of years to use and enjoy the leased premises, and to pay the rent arising under the contract regularly to those entitled thereto. It further appears, that during that time the appellee was endeavoring to buy out the interest of those who owned the rights of the lessor in the property, and was also offering to sell his own rights therein. It further appears, that during all of this long-continued control of the property, attended by repeated recognition of the validity of the lease contract, appellee did not at any time intimate that he had been deceived and defrauded, or that he intended to repudiate the contract; on the contrary, all that he said and did, after full knowledge, was wholly inconsistent with a purpose or intention of refusing to abide by it.

The record wholly fails to furnish any adequate or reasonable excuse for the long delay in bringing this suit, during all of which time the appellee has, without complaint, acquiesced in his contract and enjoyed its benefits.

It is the duty of a party who has been induced to enter into a contract through fraud, to act upon the first opportunity after discovering the fraud, and to repudiate its obligations, if he desires to avail himself of his right to rescind.

Under all the facts and circumstances of this case, as disclosed by the evidence, the appellee must be deemed to have waived his right to rescission. We are, therefore, of opinion that the appellee is not entitled to the relief afforded him by the decree appealed from, which must be reversed, and this court will enter such decree as the lower court should have entered, dismissing the bill with costs.

*Reversed.*

## Statement.

**Richmond.**

## HALL V. HALL AND OTHERS.

January 14, 1909.

1. **DEEDS—Delivery.**—A deed of trust, duly executed, acknowledged and delivered by the grantor to one of several trustees named therein and accepted by the latter without condition is sufficiently delivered, and operates a complete divestiture of the grantor's title to the property conveyed, and invests it in the grantees, upon the trusts and for the uses declared by the deed.
2. **DESCENTS AND DISTRIBUTIONS—Surviving Wife—Distributive Share—Conveyance of Personalty by Husband—Wills.**—While a husband cannot, by will, defeat his wife's claim to her distributive share in his personal estate, he may do so by an irrevocable disposition of his property in his lifetime, although he secures a life estate to himself, and his purpose is to defeat the claim of his wife as one of his distributees. An irrevocable deed of trust is not to be considered a will in disguise, merely because it disposes of nearly all of grantor's personal estate and reserves to the grantor the possession and control of the property during his life.

Appeal from a decree of the Circuit Court of Accomac county. Decree for defendants. Complainant appeals.

*Affirmed.*

The opinion states the case.

*Ben. T. Gunter and Jno. S. Parsons*, for the appellant.

*Fletcher & Powell and J. H. Row*, for the appellees.

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WHITTLE, J., delivered the opinion of the court.

Shortly before his death, J. A. Hall, who had been twice married but was childless, made his will disposing of his real estate, his household and kitchen furniture, and certain other personal estate, to various persons, mainly to his brother and nephews. But he also devised to his wife, Nellie Hall, the appellant, the farm known as the "Burton land," and a house and lot in the village of Hallwood—which devises the will declared were not to be in lieu of her dower in his other lands. He likewise bequeathed to her certain personal property.

At the same time, Hall executed a deed conveying the bulk of his personal estate, comprising bonds and stocks aggregating \$35,000, to trustees. The deed sets out accurately the securities conveyed and the names and shares of the respective donees; and clearly defines the powers and duties of the trustees. Thus, the trustees are empowered and directed to collect the interest and dividends on the principal fund for the use and benefit of the grantor during his life; and if any portion of such interest and dividends should remain at the time of his death it was to fall into and become a part of his estate. With regard to the corpus of the principal fund, the trustees were clothed with wide discretion to invest and re-invest the proceeds for the benefit of the *cestuis que trustent* until the grantor's death, the period fixed for the final distribution of that estate.

All of the beneficiaries, with a few exceptions, were relatives or connections of the grantor, and the fund was to be divided among them according to their designated portions, the appellant's share being \$3,000.

Upon the death of Hall, his widow renounced the provision made for her by his will and elected to take her dower and distributive share in the estate. She moreover brought this suit to set aside the deed and enforce her rights as widow under the statute.

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The plaintiff rests her case upon the allegations that the conveyance is inoperative as a deed, because it was never delivered; and that it is also ineffectual for the further reason, that while the writing is in form a deed of trust, it is in reality a will in disguise—a device resorted to by the grantor to enable him to retain dominion over his personal estate until his death, and at the same time to deprive his widow of her distributive share therein. Yet, inasmuch as the paper is in fact a will, it is void because not executed in accordance with the requirements of the statute.

From a decree sustaining the validity of the deed this appeal was allowed.

The testimony was chiefly directed to the question of the delivery of the deed. Without undertaking a review of the evidence, it is sufficient to state that it satisfactorily shows that the deed was duly executed, acknowledged for registry, and delivered by the grantor to one of the trustees and accepted by him without condition. The legal consequence of these acts was to operate a complete divestiture of the grantor's title to the property conveyed, and to invest it in the grantees, upon the trusts and for the uses declared by the deed. 1 Devlin on Deeds (2nd ed.), sec. 300.

With respect to the contention, that the deed is a will in disguise, the instrument speaks for itself. It is unmistakably what it purports to be, a deed of conveyance of personal property, and possesses all the attributes which attach to that species of conveyance. It is true the circumstances surrounding the transaction leave no room for doubt that it was Hall's purpose to limit the rights of his wife in his estate to the provision made for her by his will and deed. Nevertheless, if in so doing he has not transcended his legal rights, she cannot be heard to complain; nor can the courts impugn his conduct, no matter what may have been the actuating motive.

The fact that the precise question involved in this case has been twice decided by this court, renders unnecessary a dis-

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cussion of the power of the husband to disappoint his widow by divesting himself of title to his personal estate in his lifetime. (Of course, the doctrine is not to be confounded with the principles applicable to dispositions of property made in contemplation of marriage).

In the case of *Lightfoot's Executors v. Colgin and wife*, 5 Munf. 42, it was held that "a wife has not such an interest in that portion of the personal estate of her husband to which she *may* be entitled in the event of his dying intestate, or leaving a will which she may renounce, as that an absolute and irrevocable, though merely voluntary, deed thereof, executed by him to his children by a former marriage, can be considered a fraud on her rights, or be set aside at her instance. A deed of trust, *if not revocable by the grantor*, is not to be considered a will in disguise, on the grounds that nearly all his personal estate is thereby conveyed, and that he reserves to himself the possession and control of the property during his life."

It is interesting to note that this case was argued January 21, 1813, but was not decided until February 14, 1816. All five of the judges delivered opinions, and the question at issue was exhaustively considered. The conclusion reached by the majority is a correct exposition of the common law doctrine applicable to the case; while most of the English precedents relied on by the minority seem to have been controlled by the custom of particular places, and consequently form no part of the common law of this State.

The question was again before the court in the year 1850, in *Gentry & als. v. Bailey*, 6 Gratt. 594, and the court, following the decision in *Lightfoot's Executors v. Colgin and wife*, held, that "A conveyance by a husband, by which he parts absolutely with an interest in personal property, though it is not to take effect until his death, and though he retains the power to sell and reinvest or account, and also to reappoint among specified objects, is valid to bar the wife of her distributable share therein."

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*Opinion.*

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Mr. Minor states the rule as follows: "But whilst the husband cannot defeat the wife's claim to her distributive share by will, he may do so by an irrevocable disposition of the property in his lifetime, although he secure a life estate to himself, and although his declared purpose is to disappoint the wife's claim as one of his distributees." 3 Min. Inst., Pt. 1, 530.

Our attention has been called to decisions which indicate that a different rule obtains in some of the other States of the Union, but we have no disposition to depart from our own well-considered precedents, which have withstood the test of time and attained the dignity of canons of property rights in this jurisdiction.

The case in judgment is ruled by our own decisions, and the decree of the circuit court which followed them is without error and must be affirmed.

*Affirmed.*



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Statement.

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**Richmond.****HAWLEY & ANOTHER V. WATKINS.**

January 14, 1909.

1. **TRUSTS AND TRUSTEES—Trustee's Interest Adverse to Beneficiary.**—A person who has an interest in a trust fund directly antagonistic to that of the beneficiary, or whose wife has such an interest, is not a proper person to act as trustee in the administration of such fund.
2. **TRUSTS AND TRUSTEES—Breach of Trust by Trustee—Removal Case at Bar.**—The evidence in the case in judgment shows that the trustee in a deed of trust has been guilty of a breach of the trust reposed in him, has neglected his duty, and has totally disregarded the interest and welfare of the beneficiary under said deed, and hence was properly removed as trustee.
3. **WILLS—Construction—Case in Judgment—Gift of Fee—Subsequent Diminution—Repugnancy.**—A testator, by one clause of his will, gave to his sister absolutely and in fee-simple certain property. In the next clause he says: Inasmuch as my said sister is mentally incapacitated from understanding or attending to business matters, I desire that the circuit court appoint a trustee to receive the said sum of money for the use and benefit of my said sister, the said money to be advanced to her as she may need it. Should any of said sum of money be in the hands of said trustee at the death of my said sister, my desire is that the same be equally divided between X and Y.

*Held:* The sister takes the full equitable ownership in the personality and an equitable fee in the real estate given in the first clause which is not cut down nor diminished by the second clause of the will. The limitation over is void for repugnancy.

Appeal from a decree of the Circuit Court of Floyd county.  
Decree for complainant. Defendants appeal.

*Affirmed.*

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Opinion.

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The opinion states the case.

*Robert E. Scott and Dupuy & Whittle*, for the appellants.

*Howard & Howard, V. M. Sowder, R. F. Tompkins and Archer A. Phlegar*, for the appellee.

KEITH, P., delivered the opinion of the court.

Rosa B. Watkins filed her bill in the Circuit Court of Floyd county, from which it appears that she is a legatee and devisee under the will of Thomas R. Watkins, deceased. The clauses of the will which are material to the case before us are as follows:

"Sixth: The residue of my estate, real, personal, cash in hand or in bank, bonds, notes and accounts, choses in action, and all and everything of whatsoever kind, I give and bequeath and devise equally and jointly to my brothers, James E. Watkins, William C. Watkins, and my sister, Rosa B. Watkins, each receiving one-third thereof.

"Seventh: My will and desire is, that the sum hereinbefore devised to my sister Rosa B. Watkins, inasmuch as my said sister is mentally incapacitated from understanding or attending to business matters, I desire that the Circuit Court of Floyd county and State of Virginia, appoint a trustee to receive the said sum of money for the use and benefit of my said sister, the said money to be advanced to her as she may need it. Should any of the said sum of money be in the hands of said trustee at the death of my said sister, Rosa B. Watkins, my desire is that the same be equally divided between William C. Watkins and Nannie Hawley. The said trustee to be required to execute a good and sufficient bond, to be approved by said court, before he receives the said sum of money."

One John B. Hawley was appointed trustee; and the bene-

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ficiary becoming dissatisfied with his administration of the trust, filed her bill, in which she makes very serious charges against him, asks that he be removed from the position of trustee, be required to settle his accounts, and that a suitable trustee be appointed in his stead; that the trust be administered under the direction of the court; and that the nature and extent of the interest taken by Rosa B. Watkins under the will of Thomas R. Watkins be ascertained and fixed.

All proper parties were made, and such proceedings were had that the circuit court entered a decree removing the trustee, appointing V. M. Sowder in his stead, directing a settlement of the accounts of John B. Hawley, and construing the sixth and seventh clauses of the last will and testament of Thomas R. Watkins as giving to Rosa D. Watkins an equitable estate in fee simple in the real estate devised to her, and a complete equitable interest in the personalty; and that the limitations over to William C. Watkins and Nannie A. Hawley were void for repugnancy and uncertainty.

From this decree an appeal was allowed upon the petition of John B. Hawley and Nannie Hawley, his wife.

There are three grounds of error assigned in the petition: First. That the demurrer to the bill was improperly overruled. But this assignment was withdrawn when the case was argued in this court, and this withdrawal of course carries with it the several assignments of grounds of demurrer.

The second assignment of error is to the removal of John B. Hawley as trustee; and the third is because the circuit court holds that Rosa B. Watkins took a fee simple interest under the will, and that the limitations over were void.

Whatever construction may be placed upon the will, whatever interest it may appear that Rosa B. Watkins takes under the will, we are of opinion that John B. Hawley was not a proper person to act as trustee. More especially would this be true if the court had held the limitation over to be a valid

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one, because in that event the interest of his wife would be directly at war with that of Rosa B. Watkins, whose needs the testator sought to provide for. If his wife was to have a share in what remained unexpended at the death of the life tenant, it was to the direct interest of the trustee to confine the expenditures within the narrowest limits, thereby to increase the remainder.

The charge in the bill is that Hawley wholly failed to discharge his duties as trustee; that he was close and disagreeable; that he failed to make suitable provision for the complainant; that he gave her no money; and that the sums expended for her support were wholly inadequate to her comfortable maintenance.

The judge of the circuit court was of opinion that the trustee "has not kept the high trust imposed on him by the will, is clear from the general statements of facts already adverted to, which might be extended and illustrated by many details set forth in the evidence, but which would not be profitable. Suffice it to say that he has not provided her with suitable clothing, allowed her bed to be without necessary blankets for an entire winter; when sick, did not advance money to buy necessary medicine; has not spent as much as \$100.00 on this beneficiary, all told, during his trusteeship; has not given her one dime during the time; has given less than \$2.00 to any lady friend to procure any article for his beneficiary peculiar to women's wants; all showing a breach of trust, neglect of duty and total disregard to the interest and welfare of the beneficiary which cannot be suffered to continue. A trustee must be appointed who will wisely and judiciously administer this estate for the use and benefit of the plaintiff above, and thereby provide for her comfort and welfare which was the plain purpose and earnest desire of her deceased brother as expressed in his will, and who made ample provision therein to accomplish that end."

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We think we may safely say there was no error in the removal of the trustee.

The third assignment of error presents a question which has frequently been before this court. It will be observed that Rosa B. Watkins takes one-third of what is bequeathed and devised under the sixth clause of the will. Her interest is as full and complete as that of her brothers, James E. and William C. Watkins, and this not as the result of artificial construction, but by force of the plain and unequivocal language which the testator has employed. By the seventh clause of the will the testator provides for "a trustee to receive the said sum of money, for the use and benefit of my said sister, the said money to be advanced to her as she may need it. Should any of said sum of money be in the hands of said trustee at the death of my said sister, Rosa B. Watkins, my desire is that the sum be equally divided between William C. Watkins and Nannie Hawley;" and the claim is that the effect of this language is to cut down the devise and bequest to her in the sixth clause, and reduce it to a life estate, with remainder to William C. Watkins and Nannie Hawley.

There is a line of cases in which this court has held that the grant of a life estate in property, followed by an unlimited power of disposition, vests in the beneficiary a fee simple.

Thus, in *May v. Joynes*, 20 Gratt. 692, there was a devise by the testator to his wife for life, with full power to make sale of any part of the said estate and to convey absolute title to the purchasers, and use the purchase money for investment or any purpose that she pleases; with only this restriction, that whatever remains at her death shall, after paying any debts she may owe, or any legacies that she may leave, be divided as follows, among my children and grandchildren;" and it was held that the wife took a fee simple.

That case has been followed in many subsequent decisions.

## Opinion.

among others, *Davis v. Heppert*, 96 Va. 775, 32 S. E. 467, where an estate for life, coupled with absolute power of disposition, was held to create a fee simple; and *Brown v. Strother*, 102 Va. 145, 47 S. E. 236, where there was a devise to a brother and sister of testator of "all I possess on earth for their support, to be used in no other way," with a limitation over "if there is any left after their death," and the limitation over was held to be void, and that the brother and sister took an estate in fee simple.

In those cases, language similar to that employed in the seventh clause of this will, and which is here relied on to reduce to a life estate a devise in a previous clause which, without dispute, standing alone carried the full ownership of the personalty and a fee simple interest in the realty, was held sufficient to vest a fee simple in those who had, by a previous clause, been given only a life estate.

In *Gaskins v. Hunton*, 92 Va. 528, 23 S. E. 885, referring to the bill under consideration in that case, the court said: "The words used by the testator in that portion of his will in which the general or principal distribution of his estate is made are appropriate words for creating an absolute estate, and are all that are necessary for that purpose; and those provisions of the will must be construed as clearly giving to his children a fee simple in the lands devised them, and an absolute estate in the personalty bequeathed them, unless the subsequent provision of the will, by which the testator disposes of the residue of his estate, limits or diminishes that interest. It is a settled rule of construction, both in deeds and wills, that if an estate is conveyed, or an interest given, or a benefit bestowed, in one part of the instrument, by clear, unambiguous, and explicit words, such estate, interest or benefit is not diminished nor destroyed by words in another part of the instrument, unless the terms which diminish or destroy the estate

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before given be as clear and decisive as the terms by which it was created."

Can we say that the language of the seventh clause meets the requirements of the law as thus stated? We think there can be but one answer to this question, in the light of the decisions of this court already referred to and many others which we have not thought it necessary to mention.

Appellants place much reliance upon the cases of *Johns v. Johns*, 86 Va. 333, 10 S. E. 2, and *Miller v. Porterfield*, 86 Va. 876, 11 S. E. 486, 19 Am. St. Rep. 919; but this court, referring to those two cases in *Bowen v. Bowen*, 87 Va. 440, 12 S. E. 885, 24 Am. St. Rep. 664, said, that they were to be distinguished from *Bowen v. Bowen* and the cases there cited by the circumstance that in *Johns v. Johns* the power of disposal was not absolute in the first taker, for her sole benefit, but also for the benefit of her children; and in *Miller v. Porterfield*, for the benefit, not of herself alone, but of a named beneficiary.

In the case of *Hall v. Palmer*, 87 Va. 354, 12 S. E. 618, 24 Am. St. Rep. 653, 11 L. R. A. 610, the testator bequeathed to his five daughters two-thirds of his estate, to be equally divided between them, and afterwards provided that the interest of two of them should be held by his executor for their sole use and benefit during their natural life, and at their death the balance, if any, to their children. It was held that the daughters took a fee simple absolute, and the limitation over was void for repugnancy. The opinion in this case cites many English authorities, which illustrate the doctrine which prevails in this court, that after an absolute property given to one, with an unlimited power to dispose of it, express or implied, a disposition by the donor of so much of the property as may not be disposed of by the donee or legatee, to another, is void, because of the inconsistency and the uncertainty as to

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what part of the property is to go over." 3 Brown's Parl. Cas. 314.

We are of opinion that there is no error in the decree, which is affirmed.

*Affirmed.*



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Statement.

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**Richmond.**

IVANHOE FURNACE CO. v. THE VIRGINIA AND TENNESSEE  
TELEPHONE CO. AND OTHERS.

January 14, 1909.

1. TELEPHONE COMPANIES—*Interchange of Business—Rights of Patrons.*  
—A subscriber and patron of a telephone company may demand of that company the same service it renders to other patrons of that class, and none other, and of other companies the same service they accord to the public, and upon the same terms. He is in no sense a representative of the company in which he is a stockholder, and cannot dictate to that company or to other companies what physical connections they shall make, or what regulations, if any, they shall adopt for the interchange of business.
2. MANDAMUS—*Parties—Telephone Companies.*—Even if a court has jurisdiction by mandamus to compel two telephone companies to interchange business, it cannot and will not undertake to exercise such jurisdiction in a proceeding to which one of them is not a party.

Error to a judgment of the Circuit Court of Wythe county on a petition for a mandamus. Petition dismissed. Petitioner assigns error.

*Affirmed.*

The opinion states the case.

W. S. Poage, for the plaintiff in error.

W. B. Kegley, J. C. Wysor, M. M. Caldwell and Phlegar & Powell, for the defendant in error.

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WHITTLE, J., delivered the opinion of the court.

The plaintiff in error, the Ivanhoe Furnace Company, a stockholder or subscriber in the Wythe Mutual Telephone Company, presented its petition to the judge of the Circuit Court of Wythe county, praying that a peremptory writ of mandamus be issued, directed to the Virginia and Tennessee Telephone Company, commanding and compelling it, among other things, to connect its lines and exchange service with the Wythe Mutual Telephone Company, upon the same terms and conditions as it at that time connected with the Wytheville Telephone Company.

To a judgment sustaining a demurrer to the petition this writ of error was allowed.

A number of questions of more than ordinary interest have been raised and argued in this case. Thus, it is said, that if there be jurisdiction in any forum to grant the relief prayed for in the petition, it is to be found, primarily, in the State Corporation Commission, and not in the circuit court. Also, that the law does not require physical or business connections between independent telephone companies; and, if it did, that such requirement would involve the taking of private property, which can only be done by the exercise of the power of eminent domain.

In our view of the case, however, it is not necessary to consider any of these propositions. The plaintiff in error has no right to implead the defendant in error upon the issues sought to be litigated by its petition. Its status is merely that of a subscriber and patron of the Wythe Mutual Telephone Company, and in those relations it is entitled to demand of *that company* the same service that it renders to other patrons of the same class, and none other. So, also, it can only require of the defendant in error the use of its system in like manner and upon the same terms that it accords to the public generally.

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The plaintiff in error is in no sense the representative of the Wythe Mutual Telephone Company, and possesses no authority whatever to dictate to that company, or to the defendant in error, what physical connections they shall make or what regulations they shall adopt, if any, for the interchange of business. These are matters of business policy to be determined by the companies for themselves, subject only to the visitorial authority of the State. The Wythe Mutual Telephone Company is not a party; and even if the court had jurisdiction to require an interchange of connections and business between the companies, it could not and would not undertake to exercise such jurisdiction in a proceeding to which one of them was not a party.

The judgment in question is plainly right, and must be affirmed.

*Affirmed.*

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Statement.

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**Richmond.**

JORDAN &amp; DAVIS v. MAHONEY.

January 14, 1909.

1. **STATUTE OF FRAUDS—Sale of Land—Sufficiency of Memorandum—Case at Bar.**—A letter addressed to a real estate broker who has a lot for sale, authorizing him to purchase the lot at a price stated, and which is exhibited by the broker to the owner of the lot, who accedes to the price mentioned, and writes and signs at the foot of the letter, "I accept the above," is not a sufficient memorandum of a sale of real estate within the meaning of section 2840 of the Code. In order to give the letter any effect, the broker would have to act on the authority given him in the letter by making the purchase and executing, as agent, a memorandum in writing. Unless and until this was done there was no memorandum in writing signed by the person to be charged or his agent.
2. **STATUTE OF FRAUDS—Contract to Sell Land—Several Writings—Extrinsic Evidence.**—Different papers may be referred to in order to show a complete contract for the sale of land under the statute of frauds, but they must of themselves show their relation to the contract sued on, in order that they may be taken together to make the contract. Extrinsic evidence is not permissible to connect another paper with the contract sued on.

Error to a judgment of the Court of Law and Chancery of the city of Norfolk, in an action of assumpsit. Judgment for the plaintiff. Defendants assign error.

*Reversed.*

The opinion states the case.

*R. Randolph Hicks*, for the plaintiff in error.

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*G. M. Dillard*, for the defendant in error.

HARRISON, J., delivered the opinion of the court.

Edward Mahoney, the defendant in error, placed four lots owned by him in the city of Norfolk, being Nos. 7, 8, 9 and 28 as shown on a certain plat, in the hands of R. L. Forest, a real estate agent, for sale at the price of \$3,500.

Forest received from the appellants, Jordan & Davis, the following letter:

“Norfolk, Va., August 8, 1907.

“Mr. R. L. Forest,  
“City.

“Dear Sir:

“We hereby authorize you to purchase lots Nos. 7, 8, 9 and 28 on the Mahoney tract, facing 10th street, near Granby, at the price of \$3,000.

“Yours very truly,

“JORDAN & DAVIS.”

Upon the receipt of this letter, R. L. Forest called on the defendant in error, who agreed to take the sum of \$3,000 for the lots, payable \$1,000 cash and the residue in equal payments at one and two years; and thereupon the following endorsement was made by the defendant in error on the bottom of said letter:

“I accept the above.

“E. MAHONEY.”

In October, 1907, the defendant in error tendered the plaintiffs in error a deed, which they declined to accept; and thereupon this action of trespass on the case in assumpsit was brought, and under the instructions of the court a verdict was

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rendered for the alleged purchase price of the lots. The rulings of the lower court, upon the trial, are called in question by this writ of error.

The letter of August 8, 1907, from the plaintiffs in error to R. L. Forest, the real estate agent, with the acceptance endorsed thereon by E. Mahoney, was introduced in evidence and relied on as a sufficient written memorandum of the alleged sale of lots to sustain this action on the part of the plaintiff. The sufficiency of this letter, with the endorsement thereon, as evidence of a written contract between the parties, was raised by objection to its introduction, and also by an instruction asked for by the defendants, which was refused.

The Code, sec. 2840, provides, that no action shall be brought upon any contract for the sale of real estate, unless such contract, or some memorandum or note thereof, be in writing and signed by the party to be charged thereby or his agent.

It is manifest from the most casual reading, that the letter here relied on is not a contract for the sale of real estate, but merely authority given by Messrs. Jordan & Davis to R. L. Forest to buy certain lots for them. The letter authorized R. L. Forest to make a purchase, but to give the letter any effect Forest would have to act on the authority given him in the letter, by making the purchase and executing himself, as agent, a memorandum in writing. Until he did this it is clear that no memorandum in writing of the alleged sale had been made and signed, either by the person to be charged or his agent. The fact that the letter authorizes a purchase in the future shows conclusively that no sale had been made.

It cannot be successfully contended that an authority to purchase is in effect a purchase. If when the letter left the hands of the plaintiffs in error it was not a promise to purchase, it never became one, and the endorsement, "I accept the above," put thereon by the alleged vendor, imparted no new quality to the letter, and gave it no additional force.

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The defendant in error seeks to strengthen his position by reliance upon a letter dated August 28, 1907, from the plaintiffs in error to him. This letter was allowed to go to the jury over the objection of the defendants, not as proof of the contract, but as showing what occurred. It is true that different papers may be referred to in order to show the alleged agreement, but they must of themselves show their relation to the contract sued on, in order that they may be taken together to make the memorandum. *Rahm v. Klerner*, 99 Va. 10, 37 S. E. 292. The letter of August 28, 1907, does not refer to any purchase and makes no allusion to any sale. All it states is that the attorney of Jordan & Davis was absent from the city, and that he was expected back on Thursday of that week, when the writer would make an effort to have him examine the title to four lots on 10th street. This letter cannot be connected with the alleged contract except by extrinsic evidence, which is not permissible. *Rahm v. Klerner*, *supra*.

We are of opinion that the letter of August 8, 1907, was not a sufficient memorandum in writing to sustain this action on the part of the plaintiff, and that the court erred in admitting the same in evidence over the objection of the defendants.

In this view of the case, it is unnecessary to consider other assignments of error.

The judgment complained of must be reversed, the verdict of the jury set aside and the case remanded for a new trial, not in conflict with the views herein expressed.

*Reversed.*

## Syllabus.

**Richmond.****MILLER, TRUSTEE & OTHERS V. TOWN OF PULASKI.**

January 14, 1909.

1. **MUNICIPAL CORPORATIONS—*Amendment of Charters—Constitutional Law.***—It is within the power of the legislature to amend the charter of a municipal corporation, if it pursues the mode provided in article IV of the Constitution, and the special act is passed by a recorded vote of two-thirds of the members elected to each house, as provided by section 117 of the Constitution.
2. **EMINENT DOMAIN—*Public Use—When a Judicial Question.***—Whether a particular use is public or not is a question for the judiciary, and not for the legislature, but if it is in fact public, the expediency of exercising the power of eminent domain, the instrumentalities to be used, and the extent to which the right shall be delegated are questions for the legislative branch of the government.
3. **EMINENT DOMAIN—*Public Use.***—A use to be public need not be for the use and benefit of the whole public or State, or any large part of it. It may be for the inhabitants of a very small or restricted locality; but the use and benefit must be in common, not to particular individuals or estates.
4. **MUNICIPAL CORPORATIONS—*Electric Lights—Public Use.***—The power and duty to supply the inhabitants of a town with electric lights is a public use, and the necessity for its exercise, and the extent to which it may be exercised, including the right to condemn property outside the territorial limits of the town are questions for the determination of the legislature, and are not open to enquiry before the courts.
5. **EMINENT DOMAIN—*Public and Private Use Combined—Municipal Corporations.***—An act which authorizes a town to condemn land for the purpose of supplying the inhabitants of said town "or other persons, companies, or corporations" with electric lights or power embraces an object which is constitutional with one which is unconstitutional, and they are so united as to be inseparable, and hence the whole grant of power is unconstitu-



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tional. The right to furnish lights or power to "other persons, companies or corporations" is a private use, and where a private use is so combined with a public use that the two cannot be separated the whole act is void.

Error to a judgment of the Circuit Court of Carroll county, on a petition to condemn land. Judgment for the petitioner. Defendants assign error.

*Reversed.*

The opinion states the case.

*W. M. Caldwell*, for the plaintiffs in error.

*J. C. Wysor*, and *Phlegar & Powell*, for defendant in error.

KEITH, P., delivered the opinion of the court.

The town of Pulaski filed its petition in the Circuit Court of the county of Carroll, in which it states that, by virtue of its charter and the general laws of Virginia, it has authority to erect, equip and operate electric light plants for the purpose of lighting its streets, and to sell light to individuals and corporations; that in pursuance of said power it owns an electric light plant, which it is now operating, and is furnishing lights for its streets and to the citizens of the town, but that it is wholly inadequate for its needs, and it is unable properly to light its streets with the present equipment, and is unable to carry out its contracts for light with its citizens; that the present plant is entirely too small for the size of the town, and the cost of operating the same is of necessity in excess of the returns therefrom, and there is a public necessity for the erection of a larger and better plant; that the town council have decided to acquire water power to operate said

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plant, believing that such power is the best and most economical; that they have inspected numerous sites for the location of a power plant along the streams near the town, and have decided that the most available is the site situated on Big Reed Island Creek, in the county of Carroll, known as the "Narrows;" that for the purposes aforesaid it has acquired the right from all the lower riparian owners to divert the water of the creek across the "Narrows," and has purchased the fee simple title to what is known as the "Tunnel" along the course of the proposed diversion of the stream, and owns in fee simple land adjoining and surrounding said point; that J. E. Caldwell claims to have purchased from said riparian owners certain water rights, including the right to divert said stream for the creation of power, which rights so claimed by him are set forth in a deed from him to J. R. Miller, trustee, which has been duly recorded and is to be read as a part of the petition, that Miller, trustee, and those claiming under and through him assert that their rights as set out in the deed from Caldwell to Miller, trustee, have priority over some of the rights owned by petitioner; that petitioner has made an honest and *bona fide* effort to agree with Miller, trustee, and Caldwell, as agent for all parties interested, upon the price and terms to purchase their rights, but they have been unable to agree because they refuse to sell their rights or to allow the water to be diverted at a reasonable price; that under its charter and the general laws of the State petitioner is authorized to condemn lands or other property, or any interest or estate therein, for its uses and purposes, and that the property and rights owned by said Miller, trustee, which are sought to be condemned in this proceeding, and hereinabove set forth, are wanted for the uses and purposes of petitioner in constructing, maintaining and operating its proposed electric light plant; that petitioner intends to take by this proceeding 12 1-2 acres of land owned by Miller, trustee, hereinbefore mentioned and described, and shown on a map filed with the petition, and to take perpetual

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right and privilege of diverting the waters of Big Reed Island Creek from their usual course, and utilize said water perpetually for its uses and purposes, free from the right or claim of all persons whomsoever; that it has given notice to all parties in interest of its intention to make this application at this term of court; and it, therefore, prays that five disinterested freeholders may be appointed, for the purpose of ascertaining a just compensation for the aforesaid property and property rights, which petitioner proposes to condemn, and to award the damages, if any, resulting to adjacent and other property owners from the construction and operation of petitioner's work.

The commissioners were appointed and made their report to the court, that in their opinion the sum of \$250 would be a just compensation to the defendants. This sum was paid into court by the petitioner, all the exceptions on the part of the defendants to the report were overruled, and the report confirmed. To that order a writ of error was allowed by this court.

The act under which this proceeding was had is to be found in Acts of Assembly, 1906, at page 460, amending section 12 of an act to provide a charter for the town of Pulaski. Section 12, as amended, or so much thereof as is pertinent to the inquiry, is as follows:

"To establish, improve or enlarge water works and electric light works, or gas works, or to construct and equip and operate new electric light plants or water works, electric wires, poles, pipes, and other appurtenances to said plants within or without the corporate limits of said town for the purpose of supplying the inhabitants of said town, or other persons, companies or corporations with water, electric lights or power; to contract with the owners of any land, or water, or water rights, or other rights, for the use and purchase thereof, or to have the same condemned for the purposes aforesaid, whether situated within or without the corporate limits of the said town, for

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the location, extension, enlargement, or improvement of said works, or for the construction of new works, the pipe lines, wires, or pole lines connected therewith, or any fixtures and appurtenances thereof \* \* \* ”

It is claimed on the part of plaintiff in error that the passage of this amendment to the charter of the town of Pulaski was forbidden to the legislature by the Constitution of the State, which in section 63 of article IV provides, that the General Assembly shall not enact any local, special, or private law in the classes of cases therein enumerated, none of which embrace the act in question.

By section 117 of article VIII of the Constitution, it is provided, that “General laws for the organization and government of cities and towns shall be enacted by the General Assembly, and no special act shall be passed in relation thereto, except in the manner provided in article IV of this Constitution, and then only by a recorded vote of two-thirds of the members elected to each house. But each of the cities and towns of the State having at the time of the adoption of this Constitution a municipal charter may retain the same, except so far as it shall be repealed or amended by the General Assembly; provided, that every such charter is hereby amended so as to conform to all the provisions, restrictions, limitations and powers set forth in this article, or otherwise provided in this Constitution.”

It was held by this court in *Campbell v. Bryant*, 104 Va. 509, 52 S. E. 638, that “Since the adoption of the present Constitution, the legislature can, as formerly, grant charters creating cities and towns, but when such charters are granted the city or town so chartered must be organized and governed in accordance with the general laws. It cannot pass special laws conferring rights and privileges different from those prescribed by the general law, as this would be obnoxious to the constitutional provision forbidding special legislation.”

The court in that case was dealing with the creation and

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organization of a new town, and the charter was found to contain provisions which were prohibited by the constitution as well as by general law; and the decision especially leaves open the question as to what special acts may be passed in relation to cities and towns.

We are of opinion that it is within the power of the legislature to amend the charter of a municipal corporation if it pursues the mode provided in article IV of the Constitution, and the special act is passed by a recorded vote of two-thirds of the members elected to each house, as provided by section 117.

All the formalities prescribed by the Constitution appear by the journals of the House of Delegates and of the Senate to have been complied with, and that it was passed in the manner provided by article IV of the Constitution, and by a recorded vote of more than two-thirds of the members elected to each house. Indeed, plaintiffs in error do not undertake to point out specifically any defect or omission in the legislative procedure by which section 12 was adopted, but base their claim upon the broad proposition that the section in question is special legislation, which the legislature is without power to enact. In this view we cannot concur.

This brings us to a consideration of the act itself.

In *Fallsburg &c. Co. v. Alexander*, 101 Va. 98, 43 S. E. 194, 99 Am. St. Rep. 855, 61 L. R. A., 129, this court held, that private property cannot be taken for a private use, although there is no express inhibition in the Constitution to that effect; that the use which authorizes the legislature to grant to a corporation the power of eminent domain must be a public use, and that public use "must be one in which the public as such has an interest, and the terms and manner of its enjoyment must be within the control of the State, independent of the rights of the private owner of the property appropriated to the use. The use of property cannot be said to be public if it can be gainsaid, denied, or withdrawn by the owner. The public interest must dominate the private gain."

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It is established in the jurisprudence of this State, that the question as to whether or not in a particular case there is a public use is one for the courts to determine. It is judicial and not legislative in its character. *Zircle v. Southern Ry. Co.*, 102 Va. 17, 45 S. E. 802, 102 Am. St. Rep. 805; *Fallsburg &c. Co. v. Alexander*, *supra*; Lewis on Eminent Domain, (2nd ed.), sec. 158, where it is said: "It is manifest that the legislature, in providing for the condemnation of private property, must determine in the first instance whether the use for which it is proposed to make the condemnation is a public one. But this determination is not final. All the courts, we believe, concur in holding that, whether a particular use is public or not, within the meaning of the Constitution, is a question for the judiciary." But it is well settled, "that when the uses are in fact public, the necessity or expediency of taking private property for such uses by the exercise of the power of eminent domain, the instrumentalities to be used and the extent to which such right shall be delegated, are questions appertaining to the political and legislative branches of the government." Lewis on Em. Dom., sec. 238.

But while the uses for which the power is granted must be public uses, it is not necessary that the entire community, or any considerable portion of it, should directly participate in the benefits to be derived from the property taken. "The public use required need not be the use or benefit of the whole public or State, or any large portion of it. It may be for the inhabitants of a small or restricted locality; but the use and benefit must be in common, not to particular individuals or estates." Lewis on Em. Dom., sec. 161.

We have no doubt that the power may be granted to a municipal corporation, to be exercised within or without its territorial limits, and that the power and duty to furnish light is a public use.

"The condemnation of property for public sewers, or works for the disposition of sewerage, for supplying a city or town

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with water or gas, is so manifestly for public use that it has been seldom questioned and never denied." Lewis on Em. Dom., sec. 173.

We are of opinion, therefore, that if the act under consideration had been confined to the condemnation of property to enable the city to supply the inhabitants of the town of Pulaski with water, and electric lights, it would have been strictly for a public use, and that the necessity for its exercise and the extent to which it should be exercised, and that it was to be exercised beyond the territorial limits of the town, would all have been questions for the determination of the legislature, and would not be open to enquiry before the courts. *Zircle v. Southern Ry. Co.*, *supra*, and cases there cited.

But this act goes much further. It confers the power upon the town to acquire the property rights in controversy here, not only for the purpose of supplying the inhabitants of the town, but "other persons, companies, or corporations," with electric lights or power. Now, if the grant of power had been to the town of Pulaski to condemn property for the sole purpose of furnishing power to persons, companies or corporations other than the inhabitants of the town itself, it clearly would not have been a public use, and would come within the condemnation of *Fallsburg &c. Co. v. Alexander*, *supra*; and the situation is not bettered by reason of the fact that the grant of power to condemn for the illegal purpose is coupled with the grant of power for a lawful purpose.

"If a private use is combined with a public use in such a way that the two cannot be separated, the whole act is void. Thus an act which authorized the erection of a dam across a navigable river by a city, either for the purpose of water works for the city, or for the purpose of leasing the water for private use, was held void." Lewis on Em. Dom., sec. 206.

The authority referred to in the text is *Attorney General v. Eau Claire*, 37 Wis. 400, where it is said: "The legisla-

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ture may empower a city to establish water works for its use (that being a public and municipal purpose), and may also confer any legitimate power in aid thereof, such as the power to construct and maintain a dam, not obstructing the navigation of a public river or violating any other public or private right. But the maintenance of a dam for the purpose of leasing the water to private persons for private use is not a municipal or public purpose, for which a municipal corporation can be authorized to exercise the power of borrowing money and levying taxes."

The act held unconstitutional in the case just cited was amended, and came again before the Supreme Court of Wisconsin, in the case of *State of Wisconsin v. City of Eau Claire*, 40 Wis. 533, and the court, in passing upon it says: "We held in the former case, *Attorney General v. Eau Claire*, 37 Wis. 400, that the statute then before us, authorized the erection of a dam at public cost across a navigable river, either for the purpose of water-works for the city or for the purpose of leasing the water-power for private purposes; and that so the power was alternative and optional, either for a public or a private use, and therefore void. Since that decision, and obviously in view of it, the legislature has amended the statute; and the amendment so clearly and emphatically makes the power to construct the dam dependent on the power to construct water-works, and limits the power to lease the water-power to the excess not required for the water-works, as to place the power beyond criticism in that respect."

The act before us embraces an object which is constitutional and one which is unconstitutional, and they are so united as, in our judgment, to be inseparable. We cannot suppress the grant of the power to condemn for private purposes and maintain the act so far as it authorizes a condemnation for a public use, because we cannot undertake to say that the vote which the act as a whole received in the legislature, and which was



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necessary to its passage under the Constitution—that is to say two-thirds of the members elected to each house—was not influenced by the fact that the statute carried with it authority to supply with electric power, not only the inhabitants of the town, but other persons, companies or corporations. To maintain such an act would be to establish a precedent capable of great abuse, if individuals and corporations, under cover of the public use, could, under such circumstances, avail themselves of the grant of power to a municipal corporation.

We are of opinion, for these reasons, that the act is unconstitutional, and that the judgment of the circuit court must be reversed.

*Reversed.*

Syllabus.

**Richmond.**

**MOUNTAIN LAKE LAND CO. v. BLAIR.**

January 14, 1909.

1. **CORPORATIONS—Foreign Corporations—Stockholder—Liability for Debts of Corporation—Foreign Law.**—The liability of a stockholder in a foreign corporation for the debts of such corporation is to be determined by the laws of the State of incorporation.
2. **CONFLICT OF LAWS—Laws of Sister State—Presumption.**—In the absence of proof as to the laws of a sister State of the Union, having the common law as the basis of its system, it will be presumed that the common law prevails there, and the rights of the parties will be determined upon common law principles. The courts of this State will not take judicial notice of the laws of a sister State at variance with the common law, but, upon common law questions, will presume that the common law of a sister State is similar to that of their own.
3. **CORPORATIONS—Liability of Stockholders to Creditors—Assignee of Stockholder.**—Creditors of a corporation may compel payment of the stock subscribed for, so far as it is necessary to satisfy debts by the company. The whole subscribed capital is a trust fund for the payment of creditors when the company becomes insolvent. Not only is the original subscriber liable, but a transferee of stock, with notice that it has not been paid for, is liable to the same extent as the original holder. He succeeds to the liabilities as well as the rights of the transferee.
4. **CORPORATIONS—Resident Stockholder of Foreign Corporation—Liability for Debts of Corporation.**—A resident creditor of a foreign corporation may enforce in this State the liability of a resident stockholder upon his subscription to the stock of said corporation in a court having jurisdiction over such stockholder. The liability rests upon contract, and may be enforced in any court having jurisdiction of the stockholder.
5. **CORPORATIONS—Resident Stockholder in Foreign Corporation—Liability for Debts—Domestic Affairs of Foreign Corporation—Parties—Contribution.**—A suit by a resident creditor of a foreign

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corporation against a resident stockholder of such corporation to collect a debt out of the stockholder's unpaid subscription is not an interference with the domestic affairs of a foreign corporation. Other stockholders, if any, and other creditors of the company, if any, are not necessary parties to the suit. Nor is it necessary to wind up the foreign corporation in order to enforce such liability. The liability of the stockholder is several, and not joint. The defendant cannot complain that others equally liable are not sued. If he is compelled to pay more than his proportionate share of the debt asserted, he can compel contribution from the remaining stockholders.

6. FOREIGN CORPORATIONS—*Equitable Assignment of Whole Stock—Debts of Corporation—Liability at Law.*—A transfer of the stock of a foreign corporation to one person to be held for the benefit of another fastens upon the latter an equitable liability for the debts of the company, but confers no liability which can be enforced against him at law.
7. CORPORATIONS—*Unpaid Stock Subscriptions—Effect of Section 1103a, Code 1904.*—The only questions committed to the jurisdiction of the common law courts by section 1103a, Code 1904, relating to the enforcement of unpaid stock subscriptions in joint stock companies are those involving the validity of the subscriptions of resident subscribers. The statute has no application to a suit brought by a resident creditor of a foreign corporation who is attempting to enforce the equitable liability of a resident stockholder in such corporation. All that was intended to be accomplished by the statute was to deprive courts of equity of the jurisdiction which they formerly exercised, in winding up insolvent domestic corporations, in enforcing the liability of stockholders for their subscriptions, and to restrict the bringing of actions on the contract of subscription to the courts of law. Apart from this, the statute leaves the jurisdiction of courts of equity unimpaired.
8. EQUITY PLEADING—*Vacation Decree—Subsequent Ratification.*—Although a decree may have been entered by a judge without authority in vacation, if, at a subsequent term, the court, with full jurisdiction of the subject-matter, and the parties, "ratifies, approves, confirms and adopts" the vacation decree, it then becomes the decree of the court, and will not be disturbed if no prejudicial error is discovered therein.
9. EQUITY PLEADING—*Numerous Exceptions—Overruling in Gross.*—It is not error for a trial court to refuse to pass specifically and directly on numerous exceptions to evidence and the report of

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a commissioner in chancery, and its decree overruling all such exceptions, in a general way, will not be disturbed where it appears that the conclusion reached is correct, and there is sufficient evidence, free from all reasonable objection, to sustain said conclusion.

10. **COMMISSIONER IN CHANCERY—Judicial Officer—Report—Assistance of Parties.**—A commissioner in chancery is a *quasi* judicial officer, and his work should be free from all suspicion of being improperly influenced or interfered with by any party to the suit, or his agent. He should not allow an agent of a party to take any part in the preparation of his report, or papers returned as a part of such report. In the case in judgment, the paper filed with the report was not a finding of the commissioner, and was only useful as an aid in examining the great volume of evidence to which it refers. The evidence is all in the record, and can be examined without the aid of the paper, and hence no injury was suffered by reason of its return with the report.

Appeal from a decree of the Circuit Court of the city of Roanoke. Decree for complainant. Defendant appeals.

*Affirmed.*

The opinion states the case.

*Williams & Williams, John R. Johnson, and W. R. Thompson*, for the appellant.

*Robert E. Scott, Samuel A. Anderson, M. H. Aftizer* and *Abram P. Staples*, for the appellee.

HARRISON, J., delivered the opinion of the court.

This foreign attachment suit in equity was brought by the appellee, Gertrude Blair, to hold the appellant liable to her for certain indebtedness due to her from the Mountain Lake Lumber Company.

A demurrer to the bill was properly overruled and the cause

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was referred to a commissioner to take evidence and state certain accounts. In response to this order, a report was filed, finding the appellant liable to the appellee for the claim asserted by her.

From a decree confirming this report, the present appeal has been taken, bringing before us a record of more than eleven hundred printed pages, containing a mass of documentary evidence, depositions, affidavits, statements, etc., much of it irrelevant and throwing little or no light upon the questions at issue. From this mass of matter we have ascertained the following material facts, which we find to be satisfactorily established by competent evidence:

The Mountain Lake Lumber Company was a foreign corporation doing business in this State. It was organized under the laws of West Virginia, with a capital stock of \$500, upon which ten *per cent.*, aggregating \$50, was paid at the time of its organization. By its charter this company had the power to increase its stock to \$1,000,000. This power was exercised, and additional stock to the amount of \$999,500 was issued to its officers, directors and their connections, nothing being paid thereon by any of them. This entire issue of stock was subsequently transferred to Frank Woodman for the use and benefit of the Mountain Lake Land Company, the appellant, a Virginia corporation. By virtue of its ownership of this stock, the appellant took possession of and converted to its own use all the assets of the Mountain Lake Lumber Company, the debtor of the appellee, who was the owner by assignment of its obligations to the amount of \$26,902.45, with interest, subject to certain credits.

These facts being established by the record, we have to inquire, whether the appellant company is liable to the creditors of the Mountain Lake Lumber Company, and, if so, was it proper in this case, on a bill in equity, to decree against the appellant, the home defendant, in favor of the appellee, hold-

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ing the established obligations of the Mountain Lake Lumber Company.

The appellant company having become a stockholder in the Lumber Company, a West Virginia corporation, its liability to creditors of that company must be determined by the laws of West Virginia; and it is contended, that the law of West Virginia on this subject is not averred in the bill nor proven in the cause, and therefore cannot be considered.

There is no express averment in the bill as to the law of West Virginia on the case there made, but the bill alleges a state of facts under which the liability of the defendant is to be determined by those laws. In the absence of proof as to the law of West Virginia, the court will presume that the common law prevails there, and will determine the rights of the parties according to the principles of the common law. The courts of this State will not take judicial cognizance of the laws of our sister States at variance with the common law, but upon common law questions the legal presumption is that the common law of a sister State is similar to that of our own. *Houghtaling v. Ball*, 19 Mo. 84, 59 Am. Dec. 331; *Stewart v. Conrad*, 100 Va. 128, 40 S. E. 624; *N. & W. Ry. Co. v. Denny*, 106 Va. 383, 56 S. E. 321. This case must, therefore, be decided according to the principles of the common law.

The next question is whether the appellant company, as transferee of the stock of the Mountain Lake Lumber Company, and the resultant beneficiary of its assets, is liable at common law to the creditors of that company.

The law is well settled that the creditors of a corporation may compel payment of the stock subscribed, so far as it is necessary for the satisfaction of the debts due by the company. This results from the fact that the whole subscribed capital is a trust fund for the payment of creditors when the company becomes insolvent. *Thompson on Corp.*, Vol. 2, secs. 1562-66, 78-9, 82; *Beach on Private Corp.*, p. 226, sec. 118; *Morawetz Private Corp.*, Vol. 2, secs. 820-1; *Scoville v. Thayer*, 105

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U. S. 143, 26 L. Ed. 968; *Handley v. Stutz*, 139 U. S. 417, 35 L. E. 227, 11 Sup. Ct. 530; *Potts v. Wallace*, 146 U. S. 689, 36 L. Ed. 1135, 13 Sup. Ct. 196. This doctrine has been sanctioned and followed in the case of *Martin v. South Salem Land Co.*, 94 Va. 28, 26 S. E. 591.

It is quite as well established that the transferee of such stock, with notice that it has not been paid for, which the appellant in this case had, is liable to the same extent as the original holder. The transferee succeeds not only to the rights but also to the liabilities of the transferor, and in the event of the insolvency of the corporation, he is liable to contribute to the payment of its debts in like manner as if he were an original subscriber. Thompson on Corp., Vol. 3, sec. 3222; *Merrimac Mining Co. v. Levy*, 54 Pa. 227, 93 Am. Dec. 697; *Huggins v. Bank*, 193 Ill. 400, 61 N. E. 1026; *Webster v. Upton*, 91 U. S. 70, 23 L. Ed. 384; *Pullman v. Upton*, 96 U. S. p. 328, 24 L. Ed. 818.

After pointing out that it is settled law that whatever has not been paid on the stock of a corporation, and which ought to be paid, is a trust fund out of which corporate creditors have a right of payment prior to the holder of the stock, Mr. Thompson says that, "in affording relief to creditors of corporations on this ground, courts of equity proceed on the familiar principle that whoever is found in the possession of a trust fund, under circumstances which charge him with a knowledge of the trust, is bound to account as trustee to those beneficially interested in such fund." 3 Thompson on Corp., secs. 2956-7.

We shall now consider the question whether a Virginia court of equity, having jurisdiction of the real owner of the stock of a foreign corporation, can enforce against the holder of such stock a liability in favor of a creditor residing in this State; it being contended that, inasmuch as the Mountain Lake Lumber Company is a foreign corporation, the courts of this State can-

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not enforce the liability of one of its stockholders, even though that liability be to a creditor residing in Virginia.

As already shown, the rights and liabilities of a stockholder in a foreign corporation are fixed by the law of the domicile of the corporation, and he must be held to have contracted with reference to the laws of the State under which the corporation was organized; but it does not follow that his liability as such stockholder cannot be enforced by the courts of the stockholder's domicile, for such liability rests upon contract, and upon familiar principles such a right will be enforced by the courts everywhere: provided that jurisdiction of the party ultimately liable can be obtained.

The law on this subject is very clearly stated by Beach in his work on Private Corporations, Vol. 1, sec. 148. He says: "When a person becomes a stockholder in a corporation organized under the laws of a foreign State, he must be held to contract with reference to all the laws of the State under which the corporation is organized, and which enter into its constitution; and the extent of his individual liability as a shareholder to the creditors of the company must be determined by the laws of that State, not because such laws are in force in the other State, but because he has voluntarily agreed to the terms of the company's constitution. It is equally clear upon both principle and authority, that this liability may be enforced by creditors wherever they can obtain jurisdiction of the necessary parties. This does not depend upon any principle of comity, but upon the right to enforce in another jurisdiction a contract validly entered into."

Discussing the liability of a resident stockholder of a foreign corporation, Thompson on corporations says: "If the liability of a resident stockholder of a foreign corporation rests in contract merely, as in the case of the obligation to pay for shares of stock which he enters into, who has subscribed for them, or who has purchased them from a subscriber or holder, before payment, and if the obligation thus assumed is



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valid and subsisting, according to the law of the domicile of the corporation, it will be good everywhere, and upon obvious principles will be enforced in the courts of every other State or country." 3 *Thomp. on Corp.*, sec. 3047.

Again it is said: "It may be confidently stated that where the foreign corporation has property situated within the domestic jurisdiction, the road is open to proceedings *in rem* in the domestic tribunals against such property, on the part of creditors and others having claims against it, whether such persons be residents or non-residents. Where the creditors or claimants against the property are domestic citizens or *residents*, the jurisdiction is undoubted; and where they are *non-residents* the grounds of jurisdiction seem to be equally clear." 6 *Thompson on Corp.*, sec. 8059.

Morawetz on Corporations is to the same effect. This author says: "It seems clear upon principle that a creditor of a corporation whose shareholders are individually liable for its debts, may maintain a suit to enforce their liability, wherever he can obtain jurisdiction over the necessary parties." After stating that the right to maintain such a suit does not depend upon the comity of the State where the suit is brought, but upon the willingness of the courts to enforce a foreign contract, he says: "A refusal to grant a remedy in a case of this kind would not be a refusal to enforce a foreign law, it would be simply a denial of justice." 2 *Morawetz on Corp.*, sec. 875.

The doctrine laid down by these authors is fully sustained by the adjudicated cases. *Nimick v. Iron Works*, 25 W. Va. 198; *Crofoot v. Thatcher*, 19 Utah, 212, 57 Pac. 171, 75 Am. St. 725; *Guernsey v. Moore*, 131 Mo. 65, 32 S. W. 1132; *Aultman's Appeal*, 98 Pa. 505.

It is further contended that the Mountain Lake Lumber Company being a foreign corporation, the courts of this State have no control over it because such courts have no power to

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interfere with the domestic affairs of a foreign corporation, and therefore has no power to wind up or administer its assets.

It is a sufficient answer to this contention to say that it is not the object of this suit to interfere with the domestic affairs of a foreign corporation or to wind up its affairs. The suit is brought by a Virginia creditor of the foreign corporation against the appellant company, a domestic corporation owning practically all of the stock of the foreign corporation which has not been paid for, to enforce the satisfaction of her claim out of what the appellant owes on the stock held by it, which is a trust fund in its hands for the benefit of the creditors of the foreign corporation.

It is well settled that the other stockholders, if any, and the other creditors of the company, if any, are not necessary parties to a suit to enforce the liability of a stockholder in favor of a creditor. Nor is it necessary to wind up the foreign corporation in order to enforce such a liability. In such a case the liability of the stockholder is several and not joint. The appellant company cannot complain that others equally liable with it are not sued. If in this proceeding the appellant is required to pay more than its proportionate share of the debt asserted, it may in an action against the remaining stockholders require them to contribute their fair share. *Thompson v. Reno Savings Bank*, 19 Nev., 9 Pac. 121, 3 Am. St. 797-803; *Hatch v. Dana*, 101 U. S. 210, 25 L. Ed. 885; *Ogelvie v. Knor*, 22 Howard 382, 16 L. Ed. 389; *Aultman's Appeal*, *supra*.

In the light of the authorities cited, it is clear, that in this case the circuit court had the power to enter the decree complained of.

But it is contended that it was precluded from doing so by the Virginia statute, Acts 1897-8, p. 16, Va. Code 1904, sec. 1103.

We are of opinion that this act has no application to a case like the one under consideration. In the case at bar, the stock

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of the foreign corporation was transferred to and is now held by Frank Woodman, a non-resident of Virginia, and a suit against him, the legal holder of the stock, is expressly excluded by the terms of the act. It is true that the transfer of these shares to Woodman was for the benefit of the appellant company, and that by means of such transfer appellant has possessed itself of all of the assets of the foreign corporation; yet these facts, while they fasten upon appellant an equitable liability for the debts of the company, confer no liability which can be enforced at law against the appellant. The right of action at law upon the contract of subscription, the one contemplated by the act in question, would be against Woodman, the holder at law of the stock, who is a non-resident and therefore excepted from the act.

The action contemplated by the statute is one for the unpaid subscription to a joint stock company, a purely legal demand. The only questions committed to the jurisdiction of the common law courts by the express terms of the act are those involving the *validity* of the subscription, requiring such actions to be brought at the home of the defendant. The answer of the appellant in this case avers no defense going to the validity of the subscription; it does not deny the issue of the stock as charged, nor the transfer thereof to Woodman. The only defense made by the answer of the appellant is a denial of the facts showing its equitable liability.

When the proof is considered, the utter inapplicability of the statute invoked is easily seen. Prior to the passage of this act, it was the practice of courts of equity, in winding up insolvent domestic corporations at the instance of creditors, when asked to do so, to convene all the stockholders of such companies, and not only levy assessments upon the unpaid stock sufficient to pay the debts, but at the same time compel each individual stockholder, by a decree in the cause, to pay the amount thus assessed, thereby determining both the ques-

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tion as to the validity of the subscription and the amount payable thereon, questions which, if raised under other circumstances, were cognizable only at law. All that was intended to be accomplished by the statute was to deprive courts of equity of this concurrent jurisdiction with courts of law in the enforcement of the legal right, and to restrict the bringing of actions upon the contract of subscription to the law court. Apart from this purpose of the act, it leaves courts of chancery with their jurisdiction unimpaired. *Reed v. Gold*, 102 Va. 37, 45 S. E. 858.

If this act was ever intended to apply to foreign corporations, or to any other than to domestic joint stock companies, which we gravely doubt, it was clearly never intended to apply to a case like the one before us, where a resident creditor of a foreign corporation is attempting to enforce the equitable liability of a domestic corporation to satisfy her claim.

It is contended that Judge Saunders was without jurisdiction to determine this cause by the vacation decree entered by him on the 23rd day of August, 1906—that his powers in the premises had then expired.

It appears that Judge Saunders, who was holding the Circuit Court of Roanoke city, by appointment, during the disability of Judge Blair, who presided over that circuit, entered a decree at the February term, 1905, under section 3427 of the Code, making this cause, of his own motion, a vacation cause. The matter was under consideration by him until August 23, 1906, when he rendered the decree complained of. While Judge Saunders had the cause under consideration Judge Blair died, and Judge W. W. Moffett was duly elected and qualified as his successor.

It is not necessary to pass upon the question of Judge Saunders' power to enter the vacation order of August, 1906, for the reason that on the 28th day of September, 1906, at a regular term of the court, presided over by the duly elected

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and qualified judge thereof, having full jurisdiction of the subject matter and the parties, a decree was entered "ratifying, approving, confirming and adopting," the decree of Judge Saunders as the decree of the court. This decree of the September term, 1906, being a decree of a court of competent jurisdiction, it follows that if the decree of Judge Saunders was invalid because he was without jurisdiction to enter it at the time he did, this action of the court in term time made Judge Saunders' decree the decree of the court, and it will not be disturbed if this court can see from the whole record that there is no error of which the appellant can complain.

During the progress of the taking of depositions, numerous exceptions were noted by counsel for the appellant, and the court was asked to pass specifically and directly upon each of such exceptions. This the court declined to do, and overruled all of such exceptions in a general way. This is assigned as error.

These exceptions are too numerous to mention. They are for the most part without merit. There was sufficient evidence which was free from all reasonable objection to sustain the conclusion reached, and therefore the court was entirely right in declining to pass upon these multitudinous exceptions in detail.

There is a like assignment of error with respect to numerous exceptions taken by appellant to the report of the commissioner. The court declined to pass upon each of these exceptions separately and in detail, and being of opinion that none were well taken overruled them.

This action of the court was in accordance with the settled practice, and is free from error. We have examined these exceptions and concur in the conclusion of the circuit court, that they were not well taken, and were, therefore, properly overruled.

The commissioner filed with his report, an analysis of the evidence, or a series of references to the evidence, upon which

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he based his conclusions. This analysis is the subject of exception, and the court was asked to suppress it and strike it from the record, upon the ground that the commissioner should only have reported upon the facts submitted to him; and, upon the further ground, as alleged, that the so-called analysis of the evidence was the work of one W. J. Blair, the agent of the appellee in the conduct of her case. The court declined to strike out this paper, and its action in this regard is assigned as error.

There was no objection to the commissioner filing with his report an analysis of the mass of evidence that had been submitted to him. It was, however, not proper for him to allow the agent of the appellee to take any part in the preparation of this paper. A commissioner is a *quasi* judicial officer, and his work should be free from all suspicion of being improperly influenced or interfered with by any party to the suit, or by the agent of any such party. In the case at bar, however, it is immaterial whether this paper is included with or considered a part of the report. It is not the findings of the commissioner and is only useful as an aid in examining the great volume of evidence to which it refers. That evidence is all in the record and can be examined without the aid of this so-called analysis, and, therefore, the appellant has suffered no prejudice by the courts refusal to strike it from the record.

There are other minor objections to the rulings of the court during the progress of this cause. We will, however, not prolong this opinion to discuss these objections in detail. It is enough to say, that each of them has received full consideration, and they disclose no error prejudicial to the rights of the appellant, and their formal disposition could have no possible effect upon the result reached in the case.

On the whole case, there is no escape from the conclusion that the appellant company is liable to the appellee, a creditor of the Mountain Lake Lumber Company, and the decrees complained of must be affirmed.

*Affirmed.*

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Opinion.

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**Richmond.**

## MYERS v. McCORMICK AND ANOTHER.

January 14, 1909.

1. ATTACHMENTS—*Claim for Damages for Breach of Contract—Defendant Removing Effects Out of State—Jurisdiction of Justice.*—A justice of the peace has jurisdiction under the provisions of sections 2960 and 2961 of the Code to issue an attachment, on a claim for damages for breach of contract, against a defendant who intends to remove his effects out of the State. The liability for damages for a breach of contract is a debt contracted, not a tort. The statute uses the word "claim," which is as broad a term as could well have been used, and where the complaint, the affidavit and the attachment conform to the statute it cannot be said that the attachment is invalid on its face, or that the justice was without jurisdiction.

Error to a judgment of the Circuit Court of Campbell county in a proceeding by foreign attachment. Judgment for defendants. Plaintiff assigns error.

*Reversed.*

The opinion states the case.

*Adams & Adams* and *James H. Guthrie*, for the plaintiff in error.

*Leon Goodman*, for the defendants in error.

CARDWELL, J., delivered the opinion of the court.

Plaintiff in error sued out, under section 2961 of the Code of 1904, an attachment against the estate of one F. Olney

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McCormick, a debtor intending to remove his effects out of the State.

The affidavit, made by one Harrison, as agent for the plaintiff in error, before the justice who issued the attachment, sets out that, to the best of affiant's belief, F. Olney McCormick is justly indebted to the said Myers in the sum of \$3,000, for damages for breach of contract; that McCormick intends to remove his effects out of the State, etc.; and the attachment issued by the justice conforms in all respects to the affidavit upon which it was issued.

This attachment was levied by the deputy for the sheriff of Campbell county, and his return thereon is as follows: "Executed August 28, 1907, in Campbell county, Va., by levying on and attaching the following property of the defendant, F. Olney McCormick, to-wit: 500 lbs. steel shot, one core drill, hoist, engine, pump, boiler and fixtures for drill outfit, now at the mines of D. W. Myers, near Mount Athos, Campbell Co., Va."

The attachment was, as required by the statute, made returnable to the next term of the circuit court of Campbell county; and on the 13th day of September, 1907, upon the calling of the case, and on motion of one J. Wayne Hollinger, who claimed an interest in the property attached and also a lien thereon to the amount of \$1,000, by virtue of a subsequent attachment which had been levied thereon, he was allowed to appear and make defense to the attachment issued in favor of the plaintiff in error; whereupon, neither party requiring a jury to determine the question arising upon the attachment and the affidavit upon which it was issued, and the return of the sheriff showing that the attachment had been duly levied on the property named, the court having heard the evidence and argument of counsel, and desiring further time to consider of its judgment, it was ordered that the cause be and the same was submitted to the judge of the court for decision and judg-



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ment to be made and entered in vacation. And at another day, to-wit: October 21, 1907, the judge of the circuit court made his vacation order, dismissing said attachment as "invalid on its face, the justice of the peace issuing the same having no authority to do so."

The sole question, therefore, presented here is as to the jurisdiction of a justice, or of a clerk of a court of record, to issue an attachment under section 2961 of the Code on a claim for "damages for breach of contract."

Section 2961 is as follows: "On complaint by any person, his agent or attorney, whether the claim of such person is payable or not, to a justice, or to the clerk of the circuit or of any city court of the county or corporation in which the debtor against whom the claim is resides, or in which he has estate or debts owing to him, or if he has removed from the State in which he last resided, or in which he has estate or debts owing to him, or if he has never resided in the State in which he has estate or debts owing to him, or if such debtor be a corporation in which such corporation has estate or debts owing to it, that the said debtor intends to remove or is removing, or has removed his effects out of this State, so that there will probably not be therein effects of such debtor sufficient to satisfy the claim when judgment is obtained therefor, should only the ordinary process of law be issued to obtain the judgment, if such person, his agent or attorney, make oath to the truth of the complaint to the best of his belief, as well as to the amount and justice of the claim, and if the same is not payable, at what time it will be payable, the justice or clerk, as the case may be, shall issue an attachment against the estate of the debtor for the amount so stated."

This section is preceded by section 2960 of chapter 141 of the Code, relating to attachments. Section 2960 provides:

"\* \* \* If the action be to recover a debt or damages for the breach of a contract, express or implied, or damages for a wrong,

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the attachment shall be against the defendant's estate for the amount specified in the affidavit as that which the affiant believes the plaintiff is entitled to or ought to recover."

Then, section 2961, as will be observed, authorizes a justice or the clerk of the circuit or of any city court of the county or corporation in which the debtor against whom the claim is resides, or in which he has estate or debts owing to him, or it he has removed from the State in which he last resided, or in which he has estate or debts owing to him, etc., on complaint of any person, his agent or attorney, upon oath to the truth of the complaint to the best of his belief, as well as to the amount and justice of the claim, etc., to issue an attachment against the estate of the debtor for the amount of the claim so stated.

It seems clear to us that the dismissal of the attachment in this case on the ground that it is invalid on its face was error. What may be a proper determination of the question arising on the attachment, upon a hearing on the merits, we are not called upon to determine. The complaint, the affidavit and the attachment issued by the justice conform in all respects to the requirements of the statute. The statute uses the word "claim," which is as broad a term as could well have been used, and there is no interpretation properly to be made of the statute which would deny the right to issue an attachment for a claim for damages for breach of contract. The liability for damages for breach of contract is a debt contracted, not a tort. *Burton v. Mills*, 78 Va. 481.

"Actions *ex contractu*," says Mr. Minor, "are founded on a breach of contract express or implied, and are intended to redress the injury thence arising. Actions *ex delicto* are founded on, and designed to obtain redress for, torts, that is, for civil wrongs which do not proceed from the breach of any contract, express or implied." 4 Min. Inst., pp. 425-6, 428. See also 1 Chit. Pl. 111; *Peter v. Butler*, 1 Leigh 314.

Shinn on Attachments and Garnishments, Vol. 1, sec. 140,

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under the head of "Nature of Indebtedness," says: "While some States do not require that the affiant should, in the affidavit of attachment, aver the 'nature' of the demand or indebtedness, yet the prevailing rule requires the affiant to state a cause of action with such circumstantial accuracy as is necessary to apprise the opposite party of what is intended to be proved at the trial. The same degree of precision is not required in all States, but it is always well to state the character of the indebtedness as nearly within the words of the statute as may well be done. And when so required, the 'nature' of the indebtedness must, at all events, be stated substantially."

And again the same author says, in section 142: "The statement of one of the statutory grounds is sufficient foundation for the issuance of the writ, but other grounds may be also stated, if the allegations are not thereby made inconsistent." In other words, the learned author says, upon a full discussion of the subject, that where the averments of the grounds for attachment conform to the statute under which it is issued, the attachment issued thereon is valid.

In the case here, the averment of the grounds for the attachment in question conform to the requirements of sections 2960 and 2961 of the Code, and it should not have been dismissed as void upon its face.

We are of opinion, therefore, that the judgment of the circuit court must be reversed, and the cause remanded to that court for further proceedings therein not in conflict with this opinion.

*Reversed.*

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Syllabus.

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**Richmond.**

NEWPORT NEWS AND OLD POINT RAILWAY AND ELECTRIC CO.  
v. NICOLOPOOLOS.

January 14, 1909.

1. **PLEADING—Declaration in Tort—Sufficiency—Negligence—Street Railways—Rights in Highway.**—In an action to recover damages resulting from a collision between a street car and a traveler driving a vehicle on a public highway, a count in a declaration which alleges excessive speed of the street car as the proximate cause of the injury sufficiently charges the negligence of the owner of the street car; and so likewise does a count which alleges the failure of the motorman to keep a lookout as the proximate cause of the injury. The owner of a street car has no interest in the highway along which it runs, but simply a right to use it in common with the public. Street cars are governed for the most part by the same rules applicable to other vehicles on the public highway, and their owners have only equal rights with the traveling public to its use.
2. **STREET RAILWAYS—Excessive Speed—Lookout.**—Unless expressly permitted, the speed of a street car ought to be no greater than is reasonable and consistent with the customary use of the highway with safety; and it is the duty of a motorman operating such a car to keep a lookout for persons or vehicles on the highway.
3. **PLEADING—Declaration Charging Negligence—Case or Trespass—Street Railways.**—A count in a declaration which simply charges that a street railway company negligently ran its car into the plaintiff's wagon, causing the injury complained of, without saying wherein the negligence consisted, is not a good count, either in case or trespass. In either case the acts of negligence relied on as a basis of recovery must be stated. The declaration must state sufficient facts to enable the court to say, upon a demurrer, whether, if the facts stated be proved, the plaintiff is entitled to recover.

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4. **APPEAL AND ERROR—Pleading—Demurrer to One Count of Declaration—Improperly Overruling—Effect on Verdict for Plaintiff.**—If a demurrer to one count of a declaration containing several counts be improperly overruled, a verdict for the plaintiff must be set aside, unless the court can see that no prejudice did or could have resulted to the defendant from the error.
5. **DEMURRER TO EVIDENCE—Joinder—Insertion of Evidence—Stenographer's Report.**—A demurrer to evidence must contain a statement of the evidence, and until it is inserted the opposing party cannot be required to join in the demurrer. It need not be a stenographer's report of the evidence. Indeed the practice of inserting the stenographer's report of the evidence, with all of its irrelevant and immaterial matter, is not to be commended. All that is required of the demurrer is to have the evidence correctly stated in the demurrer. The old practice of inserting simply the substance of the oral testimony material to the issues raised is in most cases and with most witnesses the better one, and should be encouraged.
6. **INSTRUCTIONS—Assuming Facts.**—If an instruction assumes as a fact that which the uncontradicted evidence in the case clearly establishes, this is not prejudicial error.

Error to a judgment of the Circuit Court of Elizabeth City county in an action of trespass on the case. Judgment for the plaintiff. Defendant assigns error.

*Reversed.*

The opinion states the case.

*S. Gordon Cumming* and *E. M. Braxton*, for the plaintiff in error.

*E. E. Montague* and *William C. Stuart*, for the defendant in error.

BUCHANAN, J., delivered the opinion of the court.

This action was brought to recover damages for personal injuries caused by one of the street cars of the defendant (plaintiff in error) running into the plaintiff's wagon.

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There was a verdict and judgment in favor of the plaintiff, and to that judgment this writ of error was awarded.

The first error assigned is to the action of the court in overruling a demurrer to the declaration and each count thereof.

The first and second counts each charges that the defendant was operating its car on its track on a public road or highway, and that the plaintiff was traveling upon the same road in his wagon, when it was run into by the defendant's car. The act of negligence charged in the first count is that the defendant was operating its car at an excessive rate of speed. The negligence set out in the second count is that the motorman on the car failed to keep a proper lookout. Each count charges that the alleged act of negligence was the proximate cause of the plaintiff's injury.

The objections urged to these counts seem to be based upon the assumption that the rights of the defendant in operating its car upon the public road or highway were superior to those of the plaintiff traveling on it in his wagon. There is no foundation for this assumption. The owner of a street car line operated on a public road or highway has no property interest in the highway. He has the mere right to use the highway in common with the public. Street cars are governed for the most part by rules which govern other vehicles on the highways and streets, and their owners have only an equal right with the traveling public to their use. *Bass' Admr. v. Norfolk & C. Ry. Co.*, 100 Va. 1, 40 S. E. 100, and authorities cited.

Unless expressly permitted, the speed of a street car ought to be no greater than is reasonable and consistent with the customary use of the highway with safety; and it is the duty of a motorman operating such a car to keep a lookout for persons or vehicles on the highway or street. *Bass v. Norfolk & C. Ry. Co.*, *supra*; *Richmond Pass. & C. Co. v. Gordon*, 102 Va. 498, 505, 46 S. E. 772; *Wilkie v. Richmond Traction Co.*, 105 Va. 290, 54 S. E. 43.

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The first and second counts each set out a good cause of action, and the demurrer to each of them and to the whole declaration was properly overruled.

The third count does not aver in what particular the defendant failed to perform its duty. It charges generally that the defendant negligently ran its car into the plaintiff's wagon, whilst he was attempting to cross its track. As a count in trespass on the case, this count is not good under our decisions. See *Hortenstein v. Va. Car. Ry. Co.*, 102 Va. 919, 47 S. E. 996; *Lynchburg &c. Co. v. Guill*, 107 Va. 86, 57 S. E. 644; *Blackwood Coal & Coke Co. v. James' Admr.*, 107 Va. 656, 60 S. E. 90.

But it is insisted that if it be not a good count in case, it is sufficient as a count in trespass.

Conceding that it might be treated as a count in trespass and properly joined with the other counts of the declaration, it is not sufficient. Whether *an action based upon negligence* be in case or trespass, the same reason exists why the acts of negligence relied on as a basis of recovery should be stated in the one case as in the other. The object of a declaration is to apprise the adverse party of the ground of complaint. In actions of tort, as was said in the *Hortenstein* and in the *Guill* cases, *supra*, the declaration must state sufficient facts to enable the court to say, upon demurrer, whether, if the facts stated be proved, the plaintiff is entitled to recover.

It is further insisted that if the trial court erred in not sustaining the demurrer to that count, its action furnishes no sufficient ground for reversing the judgment, since "the verdict could only rest upon the first or second counts, and could not have been found under the third \* \* \*"

There are cases in which judgments have been sustained where demurrers to some of the counts of the declaration have been improperly overruled, but it is only where the court can see that no prejudice did or could have resulted to the defen-

## Opinion.

dant from the error. *Standard Oil Co. v. Wakefield*, 102 Va. 824, 834, 47 S. E. 830, 66 L. R. A. 792.

That is not this case. Evidence was admitted which tended to show that the motorman had not been properly instructed as a motorman before he was put to work as a motorman, and that the car was without a sand box. There was also evidence tending to prove that there was nothing to obstruct the motorman's vision after his car ran under the electric light near "College Place," and he testified that as soon as he ran under that light he saw the plaintiff's wagon, which was not, as he stated, more than forty feet ahead of him. There is other evidence which tends to show that by actual measurement the distance from that light to the point where the plaintiff's wagon was standing on the track, his horse having balked, was one hundred and seventy feet or more. If the jury believed the motorman's statement as to where and when he first saw the wagon and the evidence of other witnesses as to the distance from that point to the wagon, they might have believed that the cause of the accident was neither an excessive rate of speed nor the want of proper lookout, as charged in the first and second counts of the declaration, respectively, but that it resulted from the failure of the defendant company to exercise due care because of the motorman's want of diligence after he saw the wagon, or because of his incompetency or the inadequate equipment of the car, or from all three causes combined. It is not clear that defendant was not prejudiced by the action of the court in overruling the demurrer to the third count.

Another error assigned is to the action of the court in permitting evidence to be introduced after the parties had announced that they were through with their evidence and the defendant had demurred to it. This question is not likely to arise upon another trial, and as the judgment has to be reversed for the reason hereinbefore stated, it is unnecessary to consider this assignment of error.



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The refusal of the court to compel the plaintiff to join in the demurrer to the evidence is assigned as error.

The ground upon which the plaintiff refused to join in the demurrer was, it seems, because the demurrer did not contain the evidence. The court refused to require the plaintiff to join because the stenographer's notes had not been transcribed and presented to the plaintiff's counsel, and that he could not be compelled to do so until this was done.

A demurrer to evidence must contain a statement of the evidence. The nature and the form of the demurrer require this. See 4 Min. Inst. (1st ed.) 748-750, and cases there cited; *C. and O. Ry. Co. v. Sparrow*, 98 Va. 630, 631-634, 37 S. E. 302, and authorities cited.

While the evidence given in the cause on both sides must be stated in the demurrer, the party demurring is not required to have the notes taken and transcribed by his own stenographer copied into and made a part of the demurrer. All that is required of him is to have the evidence correctly stated in it.

The practice of inserting in demurrers to evidence, and bills of exception, the evidence as taken down and transcribed by a stenographer—questions and answers, relevant and irrelevant matter, discussions at the bar during the trial, rulings and remarks of the court which are not excepted to—is not one to be commended. It largely increases the expenses of copying and printing records, thus burdening litigants with unnecessary costs, and increases the burden of the courts in the examination of cases. The old practice of stating in demurrers to the evidence, or in bills of exception, the substance of the oral testimony material to the issues raised is in most cases and with most witnesses the better one, and ought to be encouraged by the courts.

The trial court in this case was clearly right in refusing to require the plaintiff to join in the demurrer until there was a statement of the evidence in the paper which purported to be a demurrer to the evidence.

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The action of the court in giving instructions at the request of the plaintiff, numbered I, II, V, VI, and VIII, is assigned as error. We see no objection to these instructions under the evidence in the case. If there had been any evidence tending to show that the road, upon which the plaintiff was driving his wagon and the defendant was operating its car, was not a public road or highway, the assumption in instruction II that the road upon which the accident happened was a public road might have been erroneous; but as the uncontradicted evidence clearly showed that it was such a road, no prejudice could have resulted to the defendant in not submitting the question assumed to the jury.

The instructions in the case are very numerous and seem to have submitted to the jury fairly and fully the questions involved in the case.

As the evidence may not be the same upon another trial, it is unnecessary to consider the assignment of error based upon the refusal of the court to set the verdict aside.

For the error of the court in not sustaining the demurrer to the third count of the declaration, its judgment must be reversed, the verdict of the jury set aside and the cause remanded to the circuit court, with leave to the plaintiff, if he be so advised, to amend his declaration, and for further proceedings not in conflict with the views expressed in this opinion.

*Reversed.*

Opinion.

**Richmond.**

NORFOLK AND PORTSMOUTH TRACTION CO. v. WHITE.

January 14, 1909.

1. **STREET RAILWAYS—Personal Injury—Contributory Negligence—Case at Bar.**—The evidence in the case at bar shows that the plaintiff, who was struck and injured by a street car at night, was perfectly familiar with all of his surroundings, including the street railway and its method of operation; that he was in a place of safety, with nothing to disturb his judgment, and with no duty imposed upon him, but that he stooped down to strike a match to signal a rapidly approaching car, at a point where it did not usually stop, with his head projecting over the rail, and, while in this position, was struck by the car. It thus appears that he, of his own volition, exposed himself to danger, and contributed to the injury which he received. The proximate cause of his injury was his own voluntary and negligent act, and hence there can be no recovery.

Error to a judgment of the Circuit Court of Norfolk county in an action of trespass on the case. Judgment for the plaintiff. Defendant assigns error.

*Reversed.*

The opinion states the case.

*H. W. Anderson and Williams & Tunstall*, for the plaintiff in error.

*R. H. Bagby*, for the defendant in error.

KEITH, P., delivered the opinion of the court.

White brought this action in the Circuit Court of Norfolk county to recover damages for an injury, and a verdict and

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judgment was rendered in his favor, to which the defendant company has obtained a writ of error.

There are four errors assigned in the petition. The first and second are frivolous and need not be considered. The third is to the refusal to grant two instructions asked for by plaintiff in error, and the fourth is to the refusal of the court to set aside the verdict on the ground that it was contrary to the law and the evidence.

On the night of August 8, 1906, a few minutes before ten o'clock, White left his house on Florida avenue, in Port Norfolk, Norfolk county, Virginia, in company with Mr. and Mrs. William Armstrong, who had spent the evening at his house, it being their purpose to take the car of the defendant company (plaintiff in error) at the corner of Mt. Vernon avenue and Second street. Mt. Vernon avenue runs north and south, and Second street crosses it at right angles. After reaching the intersection of the streets, where they were to take the car, in five or six minutes plaintiff says that he saw or thought he saw a flash about one block or six hundred feet away, and at that moment he stepped upon the car track and said to his friends, "I think the car is coming. Get on this side of the street." and stooped down to strike a match, "and just as I struck the match I saw the car from a light that shown from Mr. Johnson's grocery store on the corner. I threw my head up, and didn't have time to step out of the way, and it struck me, and I did not know anything more."

In answer to the question by his counsel, "Did you say you did not see this car coming after it came around the curve?" he replied: "No, sir; I can't say that I did see the car. I saw the car when she rounded in the curve, and after waiting a moment or two, I thought I saw a flash six or seven hundred feet off. It could not have been the car, because there didn't three seconds elapse between that time and the time I was struck."

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The plaintiff, in his own behalf, and other witnesses, testify that they saw no light on the car—no headlight and no lights within the car. Several witnesses, on the contrary, testify that the lights within the car were burning; that they were upon the same current which furnished the motive power, and that when the car was in motion the lights within the car were necessarily burning.

We do not find it necessary, however, to determine in this case whether this diversity of statement between the witnesses constitutes a conflict of evidence upon that point. There is evidence that the car, as it approached this crossing, was moving quite rapidly, and that it did not slow up, and no effort was made to stop it until after the accident had occurred.

The plaintiff in error asked the court to instruct the jury, that "if they believe from the evidence that the plaintiff leaned over the track upon which the car of the defendant was approaching in order to signal it, and that the action of the plaintiff in so leaning over the said track contributed to the injury, then the plaintiff was guilty of contributory negligence, and the verdict should be for the defendant.

"The court instructs the jury, that if they believe from the evidence that the plaintiff knew that the car of the defendant was approaching, and leaned over the track upon which the said car was approaching in order to signal it, and that the action of the plaintiff in leaning over the said track contributed to his injury, then the plaintiff was guilty of contributory negligence, and the verdict should be for the defendant."

The evidence shows that the plaintiff had lived near the point at which he received the injury for a number of years: that he was acquainted with all of its surroundings, including the street railway and its method of operation. The point at which his friends were to take the car was not a regular stopping place. He knew, therefore, that the car would pass by at its usual rate of speed unless a signal was given it to stop.

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They had waited five or six minutes for the car, and must have known, therefore, that it might be momentarily expected. He actually saw it at a short distance from the crossing, and warned his friends to pass over to the opposite side of the track, in order to enter the car when it should reach them, and, that he might give the signal, he stooped down to strike a match upon the rail, and in so doing his head projected over the track and was struck by the car, and he received the injury of which he complains. The very fact that he used a match as a signal is evidence of his consciousness of the near approach of the car, for we know that a match could be relied upon as a signal for only a very brief time.

The sight or sound of the approaching car could only have warned him of danger, as to which there was quite enough to put a prudent man upon his guard. Being in a place of safety, with nothing to disturb his judgment, with no duty imposed upon him, but in a moment of forgetfulness or of carelessness, he of his own volition exposed himself to danger, and thus contributed to the injury which he received. Although it be conceded that the car was without lights, it is beyond doubt that the proximate cause of the injury which he sustained was his own voluntary and negligent act. *Garvey v. Rhode Island Co.*, 26 R. I. 80, 58 Atl. 456; *Jordan v. Old Colony Ry.*, 188 Mass. 124, 74 N. E. 315; *Neale v. Springfield Ry.*, 189 Mass. 351, 75 N. E. 702; *N. & W. v. Hawkes*, 102 Va. 453, 46 S. E. 471.

We are of opinion that the instructions asked for should have been granted, and that the verdict of the jury should have been set aside as contrary to the law and the evidence.

The judgment of the circuit court is reversed, and the case remanded for a new trial.

*Reversed.*

Syllabus.

**Richmond.**

NORFOLK AND WESTERN RAILWAY CO. v. RHODES.

January 14, 1909.

1. CARRIERS—*Injury to Passenger—Presumption of Negligence.*—Where an injury to a passenger is caused by the derailing of a train, by a collision or by other accident to the car in which the passenger is riding, the happening of the accident is *prima facie* evidence of negligence on the part of the carrier, and if the passenger is free from negligence, the burden is on the carrier to show that it performed its whole duty, and that the injury was unavoidable by the exercise of human care and foresight.
2. CARRIERS—*Injury to Passenger—Negligence—Sufficiency of Declaration.*—In an action by a passenger against a carrier for a personal injury, a declaration which simply charges in different counts that the defendant was negligent in the operation of its train, that it did not have a proper road-bed or track, and that its locomotive, cars and coaches were defective, is not sufficient, but if, in addition, there are charged in each count such facts and circumstances attending the injury, as show that the movement of the train was so unusual and extraordinary as to break the plaintiff loose from his hold on the water-closet, and that the accident could not well have happened without negligence on the part of the carrier, the declaration is sufficient, as a *prima facie* presumption is raised of negligence on the part of the carrier.
3. APPEAL AND ERROR—*Bills of Exception—Incorporation of Evidence—Identification of Evidence.*—A bill of exception which, after certifying that the plaintiff and defendant each introduced evidence, says "all of which evidence, both for the plaintiff and the defendant, is found in a typewritten booklet now marked 'A,' and is adopted by the court as the evidence introduced by the plaintiff and the defendant," and that it contains all the evidence offered by them, sufficiently identifies the evidence and makes it a part of the record of the case.

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4. **CARRIERS—Injury to Passenger—Lurching of Train—Negligence—Presumption—Accident.**—In the absence of any evidence, direct or indirect, of negligence on the part of a carrier in the selection or retention of its servants, or in respect to its appliances or road-bed, and where there is no evidence of excessive speed except the opinion of witnesses who testify to no facts which show extraordinary or unusual speed, it will not be presumed that the carrier was negligent; and the fact that a passenger, walking along the aisle of a coach, is thrown to the floor by the lurching of the train while passing rapidly over a curve in the road must be deemed to be an accident for which no one is responsible. The danger of such an accident is one of the risks which the passenger assumes. While a carrier of passengers is liable for injuries resulting from the slightest negligence on its part, it is not an insurer of the safety of its passengers.

Error to a judgment of the Circuit Court of Botetourt county in an action of trespass on the case. Judgment for the plaintiff. Defendant assigns error.

*Reversed.*

The opinion states the case.

*Theodore W. Reath, Marshall McCormick and E. M. Pendleton*, for the plaintiff in error.

*Glasgow & White and W. S. Hopkins*, for the defendant in error.

BUCHANAN, J., delivered the opinion of the court.

This is an action to recover damages for personal injuries suffered while the plaintiff (the defendant in error) was being carried as a passenger by the Norfolk and Western Railway Company.

The action of the court in overruling the demurrer to the amended declaration is assigned as error.

The objection made to the declaration is that it does not



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state the facts relied on to show that the defendant company was guilty of negligence.

The first count charges, generally, that the defendant was negligent in the operation of its train; the second, that it did not have a proper roadbed or track, and the third, that its locomotive, cars, and coaches were defective. It is true that it is not alleged in what particular or respect the defendant failed to operate its train properly, or what the defect in its roadbed, track, locomotive, cars or coaches was, but each count contains the following averment:

“\* \* \* that defendant did not use due and proper care as the law required, and while the plaintiff was on said car and was standing by the water closet, using at the time due and ordinary care, and was holding on to the side of the water closet and about to open the door, and by its negligence, carelessness and default in failing to operate, manage, and run its said steam locomotive, car or coach, at and between the said points mentioned, caused and permitted its said car or coach to be violently jerked, turned and thrown to one side with a lurch, said jerking, turning and lurching being in a most violent, dangerous, and unusual and negligent manner, and so violent, unusual and unexpected as to break the plaintiff loose from his hold on the water closet and throw him first in one direction and then in another down and against the seat of the car and break his cheek bone.”

The general rule is that the happening of an injurious accident is, in passenger cases, *prima facie* evidence of negligence on the part of the carrier, and that (the passenger himself being in the exercise of due care) the burden then rests upon the carrier to show that its whole duty was performed, and that the injury was unavoidable by human care and foresight. *B. & O. R. Co. v. Wightman*, 29 Gratt. 431, 26 Am. Rep. 384; *Same v. Noel*, 32 Gratt. 394; *Gleason v. Virginia Mid. &c. R. Co.*, 140 U. S. 435, 443, 35 L. Ed. 458, 11 Sup. Ct. 859;

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2 Cooley on Torts, pp. 1415-1419; 3 Hutchinson on Carriers, secs. 1413, 1414.

This seems to be the universal rule where the injury is caused by the derailing of the train, by a collision or other accident to the car in which the passenger is riding. See authorities cited above.

Whether or not, when an injury to a railway passenger is shown, the cause of which is not at once apparent, there is a presumption that the injury was due to some want of care in the carrier or its agents or servants, need not be considered, since the facts and circumstances attending the injury, as charged in the declaration, show that the movement of the train was so unusual and extraordinary as to break the plaintiff loose from his hold on the water closet, and that the accident could not well have happened without negligence on the part of the carrier, and, therefore, raise a *prima facie* presumption of negligence on its part. See Hutchinson on Car., sec. 1414; 2 Cooley on Torts, pp. 1417-1421; 4 Elliott on Railroads, sec. 1644; *Burr v. Penn. R. Co.*, 64 N. J. L. 30, 44 Atl. 845; *Hile v. Metropolitan St. Ry. Co.*, 130 Mo. 132, 31 S. W. 262, 51 Am. St. Rep. 555; *Stovely v. Detroit, &c. Ry. Co.*, 124 Mich. 420, 83 N. W. 26.

The other assignments of error are based upon five bills of exceptions, none of which it is insisted by the plaintiff are properly parts of the record. In the view we take of the case, it is unnecessary to consider these objections, except so far as they apply to bill of exceptions numbered five.

The verdict of the jury was rendered at the December term, 1907, of the court. At that term the order of the court shows that a motion was made to set aside the verdict, and time taken until the next term by the court for its decision. At the next term (March, 1908) the order of the court shows that it overruled the motion to set aside the verdict, entered a final judgment and granted leave to the defendant "to tender its bill of

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exceptions to the judge of this court in vacation within thirty days after the end of this term, which bill of exceptions, when signed, shall be a part of the record in this cause." The bill of exceptions No. 5, which it is claimed was signed by the judge pursuant to that order, contains the following statement: "Be it remembered, that on the trial of this case, on the       day of December, 1907, the plaintiff, in order to maintain the issue on his part introduced the following evidence (here insert it). And the defendant, to maintain the issue on his part, introduced the following evidence (here insert it); all of which evidence, both for the plaintiff and the defendant is found in a typewritten booklet now marked 'A' and is adopted by the court as the evidence introduced by the plaintiff and the defendant, and the court certifies that the said booklet 'A' contains all the evidence that was offered by the plaintiff and defendant." After stating what was done in submitting the case to the jury, which resulted in a verdict and the motion to set it aside, it concludes as follows: "To which action of the court in refusing to set aside the verdict of the jury and grant the defendant a new trial, the defendant company excepted, and prayed that this its bill of exception might be signed, sealed and made a part of the record, which is accordingly done." It was signed, sealed and dated March 14, 1908.

The principal objection made to this bill of exception is, that it does not sufficiently identify and make the evidence contained in booklet "A" a part of the record.

The question of what is and what is not a sufficient identification of the evidence referred to in a bill of exception, so as to make it a part of the record, has so frequently in recent years been before this court and discussed by it that it is unnecessary to reiterate what has been said on the subject. It is sufficient to say, that we are of opinion that the evidence was sufficiently identified and made a part of the record in this case. See *Blackwood, &c. Co. v. James' Admr.*, 107 Va. 656, 60 S. E.

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90; *Jeremy Imp. Co. v. Com'th*, 106 Va. 482, 56 S. E. 224; *Kecoughtan Lodge, &c. v. Steiner*, 106 Va. 589, 56 S. E. 569; *U. S. Mineral Co. v. Camden, &c.*, 106 Va. 663, 56 S. E. 561, 117 Am. St. Rep. 1028.

It appears that the plaintiff was a passenger on the defendant's train, and received the injury complained of in going from his seat to the water closet, which was near by. He testified that as he got up from his seat to start to the closet the train "lunged" or "rocked" over towards and threw him against the closet door, and that it lunged or rocked back the other way, and not being able to catch hold of anything he fell and struck the back of the seat. He further testified that it seemed to him that the movement at the time he was injured was unusual and extraordinary, because it threw him forward and backward as it did; and that he had had no trouble before this in going through the trains upon which he had traveled.

The plaintiff introduced a witness named Johnson, who described the manner in which the plaintiff was injured as follows:

"Q. Just state how he went to the closet, and how he was thrown, and all about it. A. He started to the door, and the train rocked, and he fell, and it threw him against the door, and then he fell out in the aisle.

"Q. Then he had two falls as it were, one up against the door and— A. Yes, and then the next back out in the aisle.

"Q. Will you please state what (the) motions (of) the car and train were on that day at this time? A. I don't know that there was any unusual fast running.

"Q. What effect did it have on you when this occurred? A. Nothing more than it shook me in the seat. Shook me up against the end of the seat. \* \* \*

"Q. Was your attention called to the jerking of the train? A. Yes, sir.

"Q. What called your attention to it? A. Nothing but the rocking of the train, and the fall of Mr. Rhodes."

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The remaining witness of the plaintiff who testified to the movement of the train stated, that the train was running right rough that day. It seemed to be running in a jerk, and that the jerking was unusual; that she had never before experienced such motion and movement on a car, but she admitted that she did not travel on railroads a great deal.

The uncontradicted evidence of the defendant was, that its roadbed at the place where the plaintiff was injured was on a curve, where there was necessarily more or less rocking or jerking of the train; that its roadbed and track at that point was in good condition, and the curve not excessive; that the locomotive and cars making up the train, and the appliances by which they were operated, were in good condition; that the engineer and other servants in charge of the train were experienced and skilled in the service in which they were engaged; that the train was running at its usual speed and was operated and managed in the usual way; and that there was no more rocking or jerking than usually and necessarily takes place in the running of the train.

The plaintiff offered no evidence to show that there was any defect in the train or the appliances by which it was operated, or in the construction of the road, or that there was any negligence or carelessness on the part of those in control of the train at the time of the injury—except the fact that he was injured under the circumstances disclosed by his evidence.

While a carrier of passengers is liable for injuries resulting from the slightest negligence on its part, it is not an insurer of their safety against all contingencies except those arising from the act of God and the public enemy as are carriers of goods. For an injury happening to the person of a passenger without fault on the carrier's part it is not responsible. As the law does not presume that anyone has been negligent, it is always necessary, in order to recover against a common carrier on that ground, to prove negligence, either directly or by evidence of facts from which it may be reasonably presumed.

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In this case there is no direct proof of negligence, nor can negligence be reasonably presumed from the facts and circumstances disclosed by the record. It is a matter of common knowledge, as well as shown by the record, that trains or cars in passing rapidly over curves in the road, lurch, rock or swing, and that this is unavoidable. Railroad tracks cannot always be straight. The movement of trains is rapid, and the inevitable result is that the natural laws of motion cause the car to rock or swing or lurch as it passes over curves. This cannot be prevented and is one of the risks which a passenger assumes. See *Baltimore, &c. v. Cason*, 72 Md. 377, 380-1, 20 Atl. 113; *Byron v. Lynn*, 177 Miss. 303, 58 N. E. 1015; *Hill v. Metropolitan, &c. Co.*, 130 Mo. 132, 31 S. W. 262, 51 Am. St. Rep. 555; *Burr v. Penn. R. Co.*, *supra*.

It is true that the plaintiff and one of his witnesses express the opinion that the rocking or lurching when the plaintiff was injured was unusual and extraordinary, but they testify to no facts which show that it was unusual or extraordinary. *Foley v. Boston, &c. R. Co.*, 193 Mass. 322, 79 N. E. 765, 766, 7 L. R. A. (N. S.) 1076. The mere fact that the plaintiff, who did not have hold of anything, was thrown or fell in the way he described does not show that the movement of the train was unusual. No one was to blame for the injury so far as the record shows. It was simply one of those unfortunate accidents which sometimes happen, for which the law holds no one responsible.

There being no evidence upon which to base the verdict, the trial court ought to have set it aside.

For this error, the judgment of the circuit court will be reversed, the verdict set aside, and the cause remanded for a new trial to be had not in conflict with the views expressed in this opinion.

*Reversed.*

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## **Richmond.**

### NORFOLK AND WESTERN RAILWAY CO. v. STUART'S DRAFT MILLING CO.

January 14, 1909.

1. **CARRIERS—Interstate Shipments—Loss of Goods—Liability of Initial Carrier—Warehousemen.**—The Act of Congress of June 29, 1906, makes the initial carrier of goods, who issues a through bill of lading on interstate shipments, liable for losses occurring on connecting lines, any "contract, receipt, rule or regulation" to the contrary notwithstanding. If the constitutionality of this act be conceded, still the acts of the connecting carrier for which the initial carrier is made liable are acts as carrier, and not as warehouseman. If the goods have reached their destination, and the consignee, after ample notice, has failed and neglected to receive them for an unreasonable time, the liability of the connecting carrier ceases, and it becomes a mere warehouseman, and for its acts or negligence as warehouseman the initial carrier is not liable.

Error to a judgment of the Circuit Court of Augusta county in an action of assumpsit. Judgment for the plaintiff. Defendant assigns error.

*Reversed.*

The opinion states the case.

*Theodore W. Reath and Sipe & Harris*, for the plaintiff in error.

*Turner K. Hackman*, for the defendant in error.

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WHITTLE, J., delivered the opinion of the court.

The following are the essential facts in this case: The defendant in error, the Stuart's Draft Milling Company, which was the plaintiff in the trial court, is a domestic corporation, engaged in the manufacture and sale of flour at Stuart's Draft, in Augusta county, Virginia. The plaintiff in error, the Norfolk and Western Railway Company, which was the defendant in the lower court, is likewise a Virginia corporation, a common carrier employed in both intrastate and interstate commerce. Its road extends through the State of Virginia, and into the States of Maryland, West Virginia, Ohio, Tennessee and North Carolina.

The southern terminus of the Winston-Salem division of the company's line is at the city of Winston-Salem, in the State of North Carolina.

On November 16, 1906, the defendant received from the plaintiff a carload of flour consigned to the order of itself, to be transported to Gaffney, South Carolina, with direction to notify W. C. Carpenter of that place. In the bill of lading issued to the plaintiff it was specifically agreed that no carrier should be liable for loss or damage to the consignment not occurring on its own road, and on its own portion of the through route. It was also agreed that the bill of lading was signed for the different carriers, who might engage in the transportation of the carload of flour, severally and not jointly, each to be bound by and to have the benefit of the provisions thereof; and the plaintiff agreed that in accepting the bill of lading it should be bound by all of its stipulations, conditions, and exceptions, whether written or printed.

The defendant promptly transported the flour to the terminus of its road at Winston-Salem; and on November 18, 1906, delivered the consignment to its connecting carrier, the Southern Railway Company, without any loss or damage hav-



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ing been done thereto while in the possession of the defendant, or in the course of transportation over its road. The Southern Railway Company, in like manner, promptly transported the flour, without loss or damage in transportation, over its route to the point of destination at Gaffney, South Carolina, and was ready to deliver it to W. C. Carpenter, the consignee designated by the plaintiff, on November 22, 1906. Carpenter was immediately notified of the arrival of the car, and, from day to day, promised to receive and unload the flour, requesting the Southern Railway Company to suffer the car to remain on the track for that purpose. The consignee, pending the delay, from time to time renewed his promises to receive the consignment, and craved additional indulgence from the Southern Railway Company. The plaintiff in the mean time instructed its brokers to look after Carpenter in connection with the shipment, and subsequently sent its traveling salesman to Gaffney for that purpose. Finally, the plaintiff, on May 7, 1907, directed the defendant to have the flour reshipped to it at Stuart's Draft, at regular rates, all charges following, and delivered to the defendant the original bill of lading for that purpose. The defendant communicated the direction to the Southern Railway Company, and was advised by that company that on March 7, 1907, after due notice to W. C. Carpenter and upon his ultimate refusal to present the bill of lading and pay the carrier's charges and accept the flour, it was placed in the company's warehouse, and afterwards sold to satisfy the lien thereon. The balance which remained after payment of carrier's charges and costs of sale was tendered to the plaintiff and refused.

The defendant had no knowledge of any of these transactions until it was apprised of them by the Southern Railway Company on June 21, 1907, when it forthwith notified the plaintiff.

Whereupon, this action was brought against the defendant in its capacity of common carrier, to recover damages for the

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loss of the flour. The case was submitted to the court without the intervention of a jury, upon agreed facts, and to a judgment in favor of the plaintiff fixing liability on the defendant for the loss sustained, this writ of error was allowed.

The plaintiff rests its right of recovery exclusively upon the Carmack Amendment of section 20 of the act of Congress to regulate commerce, passed June 29, 1906. The amendment provides: "That any common carrier, railroad, or transportation company receiving property for transportation from a point in one State to a point in another State, shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule or regulation shall exempt such common carrier, railroad or transportation company from the liability hereby imposed: *Provided*, that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law. That the common carrier, railroad, or transportation company issuing such receipt or bill of lading shall be entitled to recover from the common carrier, railroad, or transportation company on whose line the loss, damage or injury shall have been sustained the amount of such loss, damage, or injury as it may be required to pay to the owners of such property, as may be evidenced by any receipt, judgment, or transcript thereof." 34 U. S. Stat. Pt. 1, p. 595.

There is much force in the contention that this amendment is in violation of the V and XIV Amendments of the Constitution of the United States, which forbid that either Congress or any of the States "shall deprive any person of life, liberty or property without due process of law, nor shall private property be taken for public use without just compensation."

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In that connection it is insisted that the imposition upon the defendant, as initial carrier, of liability for loss, damage, or injury of the flour occasioned by the act, neglect or default of the Southern Railway Company, or any other connecting carrier over whose line the flour passed, deprives the defendant of its property without due process of law.

The importance of this question can hardly be overstated; yet, in the view which we take of the case, it is not necessary to consider or decide the constitutionality of the amendment. Assuming that it was within the competency of Congress and is constitutional, it is obvious, under the conceded facts, that the case in judgment does not fall within its terms. The flour was promptly transported over the respective lines of the initial and connecting carrier to Gaffney, South Carolina, the point of destination, without loss, injury, or damage, and upon its arrival on November 22, 1906, Carpenter, the consignee named by the plaintiff, was duly notified. He promised to receive and unload the goods, and requested that the car be left on the Southern Railway's track for that purpose.

By clause 5 of the bill of lading, it was made the duty of the plaintiff promptly to have accepted the flour and paid the carriers' charges thereon. Moreover, unless removed within twenty-four hours after its arrival at destination, the Southern Railway Company could keep it in the car, depot or place of delivery of the company at the sole risk of the owner, or, at its option, remove and otherwise store the goods at the owner's risk and cost, to be held subject to the carrier's lien for all freight and other charges.

The plaintiff knew of Carpenter's attitude with regard to the shipment; and, as we have seen, the Southern Railway Company forbore to enforce its lien from November 22, 1906, until March 7, 1907. The time allowed the plaintiff within which to accept and remove the flour was greatly in excess of the period fixed by the bill of lading, or of a reasonable time.

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There was, as observed, no loss, damage, or injury to the goods while on the line of the connecting carrier as contemplated by the Carmack Amendment; and the flour was not sold until long after the Southern Railway Company's liability as carrier had terminated, and the new relation of warehouseman had been forced upon the company by the negligence of the plaintiff.

It is not infrequently a question of some nicety to determine the precise point of time at which the liability of a railroad company as carrier ceases and that of warehouseman begins; but no such difficulty confronts us in this instance, either from the standpoint of contract or of the general law applicable to carriers.

In *Ala. & Tenn. Rivers R. Co. v. Kidd*, 35 Ala. 209, the doctrine is stated as follows: "If goods are transported by railroad, consigned to the owner or a third person, and are not called for by the consignee when they arrive at their destination, or within a reasonable time thereafter, and are then deposited by the railroad company in one of its own warehouses, to be kept for the owner or consignee, the company ceases to be liable as a common carrier, and becomes liable only as a warehouseman, or bailee; and if the company has no warehouse at that place, it may deposit the goods in the warehouse of a responsible third person, for and on account of the owner or consignee, and thus put an end to its liability as a carrier."

That case also holds that it is as much a part of the contract that the owner or consignee of goods shall be ready at the place of destination to receive them on their arrival, or within a reasonable time thereafter, as that the carrier shall transport and deliver them.

In 6 Cyc. 455, it is said: "The carrier remains liable until the goods have reached their destination, and the consignee has had reasonable opportunity (involving notice of arrival when such notice is essential to charge him with the duty of taking

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the goods), to receive the goods from the carrier, and that, after the expiration of such reasonable time, the liability of the carrier, if the goods remain in his possession, is that of warehouseman only. The carrier is liable only as warehouseman after the consignee has refused to receive the goods, or while the goods are held by the carrier at the request and at the convenience of the consignee." *Pendell v. The St. Louis & Hannibal Ry. Co.*, 41 Mo. App. 84; *Chesapeake & Ohio Ry. Co. v. Beasley*, 104 Va. 788, 52 S. E. 566, 3 L. R. A. (N. S.) 183.

There can be no doubt of the correctness of the general principle embodied in the preceding statements of the law, and it is conclusive of this case, because the vicarious liability sought to be fastened upon the defendant is for the acts of the connecting carrier as carrier and not as warehouseman.

For these reasons the judgment of the circuit court must be reversed, and the case remanded for further proceedings.

*Reversed.*

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Syllabus.

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**Richmond.**

## SAUNDERS AND OTHERS v. SAUNDERS' ADMINISTRATORS.

January 14, 1909.

1. **WILLS—Construction—Gift to a Class.**—Whether a devise or bequest is to class or to the individuals constituting the class distributively is a question of intention, depending upon the language of the testator in making the gift.
2. **WILLS—Gift to a Class.**—A gift to a class is an aggregate sum to a body of persons uncertain in number at the time of the gift, to be ascertained at a future time, who are to take in equal or some other definite proportions; the share of each being dependent for its amount upon the ultimate number.
3. **WILLS—Gift to a Class—Failure as to One of Class.**—Where a gift is to a class and it fails as to one of the class, because of death, revocation or any other cause, the survivors of the class will take the whole.
4. **WILLS—Construction—Case in Judgment—Gift to Class—Revocation as to One of Class.**—A testator devised all of his property to his wife for life, with remainder to the children of his brother and to his ward, share and share alike, and provided that in the event of the death of any of said children, leaving issue, then such issue should take the share of their deceased parent, and in the event of the death of his ward without issue, then the entire estate should go to his said brother's children. By a subsequent codicil he revoked the provision for the benefit of his ward. The brother left five children, all of whom were in being at the date of the will, but one of them died before the testator, leaving issue. It was claimed by the heirs and next of kin of the testator that he died intestate as to the share which would have gone to his ward, but for the codicil revoking the provision in her favor.

*Held:* The effect of the revocation of the gift to his ward by the codicil was to take her out of the class originally made by the

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will, and to leave the entire residuum to go to the children of the testator's brother who survived the testator, and the issue of the deceased child.

Appeal from a decree of the Circuit Court of Culpeper county on a petition filed in the suit of *Saunders's Administrators v. Saunders and others*. Decree for defendants. Petitioners appeal.

*Affirmed.*

The opinion states the case.

*Grimsley & Miller and Harley & Wheeler*, for the appellants.

*Waite & Perry, Rixey & Hiden and Jno. S. Barbour*, for the appellees.

BUCHANAN, J., delivered the opinion of the court.

On the 21st of January, 1885, C. A. Saunders made his last will and testament, which contains the following provision:

"I give, devise and bequeath all of my property of every description and wherever located to my wife, Lucy R. Saunders, for and during her natural life, and at her death to be divided between the children of my brother, Richard Saunders, of Dunnville, Essex county, Virginia, and my ward, Miss Eva Byrd Hill, to share and share alike, and in the event of the death of any of the children of my brother leaving issue, then such issue to take the share of their deceased parent, and in the event of the death of my ward, Miss Eva Byrd Hill, without issue, the entire estate to go to my brother's children."

By a codicil made June 6, 1890, he revoked the provision for the benefit of his ward.

Richard Saunders, the brother of the testator, died in the year 1888, leaving five children, all of whom were in being

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at the date of the will, but one of them died before the testator leaving issue.

The contention of the appellants is that the share of the testator's estate which would have gone to his ward, Eva Byrd Hill, but for the codicil revoking the provision for her benefit, lapsed and passed under the statute of descents to the heirs and next of kin of the testator. The appellees, on the other hand, insist that the residuary estate of the testator was given to the children of Richard Saunders and Eva Byrd Hill as a class, and that upon the revocation of the provision in favor of Miss Hill, the share which would otherwise have gone to her did not lapse, but passed to the other members of the class. In other words, the controversy between the parties is whether the gift to the children of Richard Saunders and Miss Hill was a gift to a class, or distributively to them as individuals.

Whether a devise or bequest is to class or to the individuals constituting the class distributively, is a question of intention, depending upon the language of the testator in making the gift. All the provisions of the will may be considered, and sometimes aid may be had from the relation and situation of the parties.

In this case, there is nothing outside of the clause quoted which throws much, if any, light upon the question. Miss Hill, the ward of the testator, was an orphan, a grand-niece of his wife, and had been reared as a member of his family since the death of her parents, which occurred within six months after her birth. It is clear from the testator's original will that he intended to dispose of his entire estate. He gives the whole of it for life to his wife, and then it is to be equally divided between his ward, Miss Hill, and the children of his brother, Richard, share and share alike. This disposition of the remainder was a class gift under the authorities.

Mr. Jarman on Wills (5th ed., Bigelow), 269, defines what constitutes a gift to a class as follows: "A number of persons



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are popularly said to form a class when they can be designated by some general name, as 'children,' 'grand-children,' 'nephews;' but in legal language the question whether a gift is to a class depends not upon these considerations but upon the mode of the gift, namely, that it is a gift of an aggregate sum to a body of persons uncertain in number at the time of the gift, to be ascertained at a future time, and who are to take in equal or in some other definite proportion, the share of each being dependent for its amount upon the ultimate number of persons."

"In legal contemplation," says Page on Wills (Ed. 1901), sec. 540, "a gift to a class is an aggregate sum to a body of persons uncertain in number at the time of the gift, to be ascertained at a future time, who are to take in equal or some other definite proportions, the share of each being dependent for its amount upon the ultimate number."

Mr. Jarman gives as an illustration of what will constitute a gift to a legal class, as distinguished from what is popularly said to form a class, the following: "A gift to A, B, and C and the children of D share and share alike is, legally speaking, a gift to a class, but those persons would not, in the ordinary acceptance of the term form a class." Vol. 1, p. 269. See also *Porter v. Fox*, 6 Simmons Chy. 485; *Knapping v. Tomlinson*, 34 L. J. N. S. 3; *Re Stanhope's Trusts*. 27 Beavan, 203.

In the case of *Pendleton v. Hoomes*, Wythe, 94, the residuum of the testator's estate was disposed of as follows: "I give all the residuum of my estate to be equally divided between the children of my uncle, Benjamin Hoomes, and my nephew, John Hoomes, and their heirs forever, share and share alike." Between the date of the will and the death of the testator, one of Benjamin Hoomes' children died. John Hoomes claimed that the share of the deceased lapsed and passed to him as the heir at law of the testator, but Chancellor Wythe held that it did not lapse, but that the surviving legatees or their assignees shared

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as if the deceased child had never existed, thus holding in effect, if not in words, that the gift was to the testator's nephew and the children of his uncle as a class.

The language of the gift of the residuum in that case is substantially the same as the gift of the remainder in this, except that in this case there is a provision that if any of the children of the brother die leaving issue, such issue shall take the deceased parent's share, and if his ward die without issue the entire estate is to go to his brother's children. There is nothing in that language which shows that the testator did not intend his gift to be to a class, or which furnishes any sufficient reason for holding that it was not such a gift.

Where the gift is to a class and it fails as to one of the class because of death, revocation, or any other cause, the survivors of the class will take. 1 Jarman on Wills (5th ed.) 341; *Humphrey v. Taylor*, Ambler's Rep. 136; *Short v. Gashell*, 4 East, 419.

The effect of the revocation of the gift to his ward by the codicil to the testator's will was, therefore, to take her out of the class and leave the entire residuum to go to the children of the testator's brother who survived the testator and the issue of the deceased child.

We are of opinion, therefore, that there is no error in the decree appealed from, and that it should be affirmed.

*Affirmed.*

Syllabus.

**Richmond.**

SAXBY AND WIFE V. SOUTHERN LAND COMPANY.

January 14, 1909.

Absent, Keith, P., and Cardwell, J.

1. FRAUD—*Representation as to Ownership and Price of Land—Option.*—Pending a valid option to purchase land, the party holding the option is the only one who can make a sale of it or fix a price. A representation, therefore, by the holder of the option that he owns the land, and that it cannot be bought for less than a stated sum is not such a fraud upon a purchaser from him as will entitle such purchaser to recover damages for deceit. The question of ownership was immaterial, and the price was under his control.
2. FRAUD—*Option on Land.*—The mere fact that an option is taken for the purpose of speculation does not constitute fraud or unfair dealing on the part of the person taking the option.
3. FRAUD—*Expressions of Opinion—What Constitutes Opinions—Case at Bar.*—The statements by the owner of a farm containing about 450 acres that about 150 acres of it is in pine timber of which about twenty acres have been burned over; that the timber when cut into cord wood will readily sell on the local market for four dollars per cord, and that the land is specially adapted to potato culture, and will, by the use of fertilizers, yield one hundred bushels of potatoes to the acre, are mere expressions of opinion about matters of an essentially uncertain nature, and though untrue and relied on by one who purchases the land upon the faith of them, do not furnish the basis of an action to recover damages for deceit. The statements are sufficiently indefinite to put a purchaser on his guard to make further inquiry if he regards the matter as material. The mere expression of an opinion, however strong and positive the language may be, is no fraud.

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Error to a judgment of the Circuit Court of New Kent county in an action of trespass on the case. Judgment for the defendant. Plaintiffs assign error.

*Affirmed.*

The opinion states the case.

*Isaac Diggs*, for the plaintiff in error.

*Manly H. Barnes, Norvelle L. Henley and Robert E. Henley*, for the defendant in error.

HARRISON, J., delivered the opinion of the court.

More than two years after the transaction here involved had been consummated between the parties thereto, this action was brought by the plaintiffs in error against C. B. Chapman, trading as the Southern Land Company, the defendant in error, to recover damages for alleged false and fraudulent representations made in regard to the sale of a certain farm known as "Winslow."

As a substitute for the original, an amended declaration was filed, which was demurred to, upon the ground that it was indefinite, uncertain and contradictory, and that its allegations did not justify the relief asked. The demurrer was sustained and the suit dismissed. Thereupon, this writ of error was awarded.

The first ground of fraud alleged is that C. B. Chapman, the defendant in error, represented to the plaintiffs in error that he owned Winslow farm, and that it could not be purchased for less than \$8,000; whereas, he did not own the farm, but only had an option to buy it, and the real owners were anxious to sell and would have sold it for \$4,000.

If C. B. Chapman had, as alleged, an option to buy the farm, then the owners could not have sold it at \$4,000 or any other

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price during the existence of the option. The sale of the farm and the price at which it could be bought during that time were entirely under the control of Chapman, by reason of his option. He alone could fix the price at which the farm should be sold. When, therefore, he said that the farm could not be bought for less than \$8,000, he made a statement that he had a right to make. The question of ownership was immaterial. The real question was the price, which Chapman had the right to determine.

The mere fact that an option is taken for the purpose of speculation does not constitute fraud or unfair dealing on the part of the person taking the option. *Cummins v. Beavers*, 103 Va. 230, 48 S. E. 891, 106 Am. St. Rep. 881.

The second and third grounds of fraud alleged are that the farm was represented to contain at least 150 acres of pine timber, of which about 20 acres had been burned over; whereas, there was about 120 acres in timber, of which about 60 acres had been burned over.

It is well settled that a misrepresentation, the falsity of which will afford ground for an action for damages, must be of an existing fact, and not the mere expression of an opinion. The mere expression of an opinion, however strong and positive the language may be, is no fraud. Such statements are not fraudulent in law, because, as said by Judge Staples in *Grim v. Byrd*, 32 Gratt. 293, they do not ordinarily deceive or mislead. Statements which are vague and indefinite in their nature and terms, or are merely loose, conjectural or exaggerated, go for nothing, though they may not be true, for a man is not justified in placing reliance upon them. An indefinite representation ought to put the person to whom it is made on inquiry. *Kerr on Fraud and Mistake*, pp. 82-83.

The declaration states that the farm in question contained 444 acres, 1 rood and 26 poles. It is manifest that the vendor was not asserting a fact in stating the number of acres in

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timber and the number burned over, but was merely expressing his opinion from appearances. The declaration does not charge him with saying more than that there were about 150 acres in timber and about 20 acres burned over. These expressions indicate that the defendant in error was not making statements of ascertained facts, but was merely expressing his opinion of the acreage in timber and the portion thereof which was burned over. The statements were sufficiently indefinite to have put the plaintiffs in error on their guard to make further inquiry if they regarded the matter as material.

The last two grounds of fraud alleged are that the defendant in error stated that the timber, when cut into cord wood, would readily sell at the local stations on the railroad for \$4.00 per cord; whereas, it could be sold only for a much smaller price; and that the land was specially adapted to potato culture, and would by the use of fertilizer yield one hundred bushels of potatoes to the acre; whereas, by actual experiment the land failed to produce anything like that yield by the use of fertilizers.

There is no allegation that the land had produced 100 bushels of potatoes to the acre, or that cord wood had brought \$4.00 per cord at local stations. The production of land in the future, and the price of cord wood in the future, are dependent upon so many conditions that no assertion of an existing fact would be made with respect thereto.

The statements relied on as grounds of fraud cannot be regarded otherwise than as speculative expressions of opinion—mere trade talk—with respect to matters of an essentially uncertain nature. *Kerr on Fraud and Mistake, supra; Gordon v. Parmelee*, 2 Allen (Mass.) 212.

We are of opinion that the demurrer to the declaration was properly sustained. The judgment complained of must, therefore, be affirmed.

*Affirmed.*

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**Richmond.**

## HOWELL V. MORIEN AND OTHERS.

March 11, 1909.

1. JUDICIAL SALES—*Upset Bids—Refusal to Accept.*—Where a judicial sale has been fairly made, at a good price, and there is no suggestion of any misconduct or impropriety in connection with the sale on the part of anyone, it should not be set aside merely because an upset bid of ten *per cent.* advance is offered, and the auctioneer is of opinion that the property will bring considerably more on a resale. To set aside such a sale would not inspire confidence in the stability of judicial sales, but would tend to deter and discourage bidders.

Appeal from a decree of the Circuit Court of Henrico county refusing to confirm a judicial sale. Purchaser appeals.

*Reversed.*

The opinion states the case.

*Samuel A. Anderson*, for the appellant.

*A. W. Patterson, F. T. Sutton, Jr., and H. St. John Coalter*, for appellees.

BUCHANAN, J., delivered the opinion of the court.

The only question involved in this appeal is whether or not the trial court erred in not confirming the sale of two small

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parcels of land sold under a decree of the court for the purposes of partition.

The special commissioners who made the sale reported to the court that after due advertisement of the time, terms, and place of sale they had offered it for sale; that the appellant being the highest bidder, both parcels were knocked off to him at the aggregate price of \$1,435, but since the sale J. T. Sloan, a responsible person, who was not present at the sale made by them and did not know of it, had offered an upset bid of \$1,578.50, being an advance of ten *per cent.* over the bids of the appellant, Arden Howell, and recommended the acceptance of the bid and a re-sale of the property.

The report of the commissioners of sale was excepted to by Mr. Howell, the purchaser, so far as it recommended the acceptance of the upset bid, upon the ground, among others, that the sale to him was a fair one, that he had been put to considerable expense and loss of time in the examination of the title to the property, which conferred upon him rights as a purchaser that should be protected by the court.

The court overruled his exceptions, refused to confirm the sale, accepted the upset bid, and ordered a resale. From that decree this appeal was taken.

In the case of *Watkins, &c. v. Jones, &c.*, 107 Va. 6, 57 S. E. 608, 1 Va. App. 291, the property had been knocked down at \$2,100, and the advance offered by the upset bid was \$300, more than fourteen *per cent.* The trial court refused to confirm the sale. In giving its reason for reversing that action of the circuit court, this court said: "Under the practice of the English courts of chancery, where an upset bid is put in before confirmation, it is the rule to re-expose the property to sale, but such is not the law with us. We need not review the many decisions of this court touching this subject. That was done by Judge Riely in *Moore v. Triplett*, 99 Va. 603, 32 S. E. 50, 70 Am. St. Rep. 882." In that case (*Watkins v. Jones*) it was



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held that if the terms of the decree of sale have been complied with, and the land has been sold under favorable circumstances and has brought a fair price, and confirmation is recommended by the commissioners who made it, the sale should be confirmed.

The sale under consideration was a fair one, at a good price (being more than three and one-half times as much as the sum at which the land was assessed for taxation); and there is no suggestion of any misconduct or impropriety in connection with the sale on the part of anyone. The only reasons given by the commissioners why they recommended that the sale should not be confirmed were, that the upset bid of ten *per cent.* was a substantial advance, and that the auctioneer who had made the sale was of opinion that the property would bring considerably more on a resale. One of the commissioners suggests that the advertisement of sale in the *Times-Dispatch* was not "a conspicuous one, and perhaps your special commissioners were too economical in the use of space with the newspaper for a sale like this." This suggestion is not concurred in by the other commissioner, who states that the advertisement was as conspicuous as usual in such sales. The affidavit of the auctioneer was not taken to show upon what he based his opinion that the property would, if resold, bring a considerable advance.

There is, therefore, really nothing in the case upon which to base the action of the court in its refusal to confirm the sale, except the advance bid of ten *per cent.*

To set aside a judicial sale upon the facts and circumstances disclosed by this record would establish a practice which would be hurtful rather than helpful in securing the best price for property sold at judicial sales, and instead of inspiring confidence in the stability of such sales, in order to induce possible purchasers to attend and bid, would deter and discourage them, and establish a precedent which would make them feel that judicial sales are not to be seriously taken. *Watkins v. Jones, supra*, and cases cited.

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**We are of opinion, therefore, that the decree appealed from should be reversed, and the cause remanded to the circuit court for further proceedings not in conflict with the views expressed in this opinion.**

*Reversed.*

**Syllabus.**

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**Richmond.**

**TIDEWATER RAILWAY CO. v. HURT.**

January 14, 1909.

Absent, Cardwell, J.

1. **EQUITY PLEADING—Demurrer Sustained—Amendment—Effect.**—When a demurrer to a bill in equity is sustained, with leave to the complainant to amend, if he exercises the privilege, he cannot afterward be heard to object to the decree on the original bill.
2. **RAILROADS—Contract for Right of Way—Recital—Contract to Construct.**—A contract between a railroad company and a land owner for the purchase of a right of way, and which, by way of preamble and inducement, recites the purpose of the railroad company to build a road between two designated points, or sections, is not a contract or covenant on the part of the railroad company to build a railroad, but, if the land is sufficiently designated and the price fixed, is a valid and enforceable contract for the sale of the land described. The statute requires an effort to make such a contract before the company can condemn, which would be a useless ceremony if the contract, when made, could not be enforced.
3. **SALES—Essentials of Valid Contract.**—A written contract of sale which contains within itself a description of the thing sold, by which it can be known or identified, of the price to be paid for it, of the party who sells it and the party who buys it, contains all the requisites of a valid written contract of sale.
4. **RAILROADS—Contract for Right of Way—Recitals—Contract to Construct Road—Specific Performance.**—The recital, in a contract between a railroad company and a land owner for the purchase of a right of way, that the company proposes to build a railroad "from the West Virginia line, at or near New River, through Southern Virginia to tidewater," constitutes only an inducement to the contract, the truth or falsity of which would exert proper

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influence with the court in exercising its discretion in granting or refusing specific performance, but does not impair the force or effect of the contract where the recital is made in good faith and is true.

5. **CONTRACTS—Conditions Precedent—Performance.**—A plaintiff will not be required to perform his contract if it is not a condition precedent before he can call on the defendant to perform his, which alone can secure the plaintiff in the rights he acquired under the contract.
6. **SPECIFIC PERFORMANCE—Part Performance—Fraud.**—A court of equity will decree the specific performance of a written contract for the sale of real estate at the instance of a purchaser who has partly performed the contract under circumstances which affect the conscience of the vendor, and where a failure on his part to carry out the contract would operate a fraud on the purchaser's rights.

Appeal from a decree of the Circuit Court of Pittsylvania county. Decree for the defendant. Complainant appeals.

*Reversed.*

The opinion states the case.

*Robertson, Hall & Woods*, for the appellant.

*Caskie & Coleman*, for the appellee.

WHITTLE, J., delivered the opinion of the court.

The appellant, the Tidewater Railway Company, assigns error to the action of the circuit court sustaining the demurrer to the original bill. But the rule is well settled, that when a demurrer to a bill is sustained, with leave to the plaintiff to amend, if the plaintiff exercises that privilege, he cannot afterward be heard to object to the decree on the original bill. *Fudge v. Payne*, 86 Va. 303, 10 S. E. 7; *Connell v. Railway Company*, 93 Va. 44, 24 S. E. 467, 32 L. R. A. 792, 57 Am. St.

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Rep. 186; *Brickhead v. Railway Company*, 95 Va. 648, 29 S. E. 678.

This appeal, therefore, only calls for a review of the decree dismissing on demurrer the amended bill.

The material allegations of that bill are as follows: That the appellee, John L. Hurt, being the owner of 2,000 acres of land on the waters of Staunton river, in Pittsylvania county, entered into a contract in writing with the appellant, whereby he agreed, in consideration of \$800 and the further consideration of the adoption by the appellant as the location for its proposed railway, or a branch thereof, a line crossing appellee's land, to sell and convey to appellant a strip of land for right of way 100 feet wide, with such additional land contiguous thereto as might be required for slopes of cuts and other designated purposes, containing 6.5 acres; that appellant was allowed 90 days from the date of the contract within which, at its option upon notice in writing of such intention, to demand a deed to the land in controversy; that, at the date of the contract, appellant had adopted as the location for its railroad a line crossing Hurt's land, and was actually engaged in the construction of the proposed road from the West Virginia line, at or near New River, through Southern Virginia to Tidewater; that the entire line of railway at that time had been let to contract, and was then being constructed, a large part of the work thereon having been completed; that the contract was made subject to the approval and acceptance of appellant's general manager, and had been accepted by him; that Hurt was duly notified of such acceptance, and a conveyance of the land was demanded; that the appellant had been put in possession of the land by Hurt, and with his knowledge and consent had made valuable improvements thereon, and had expended large amounts of money in the construction of its railroad over and through the same; that the taking possession of the land and the making of valuable improvements upon it were done pursuant to the contract

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of purchase, and appellant has so far executed the contract that failure on Hurt's part to carry it out would operate a fraud upon its rights; that the appellant has always been ready and willing to consummate the agreement, and had demanded the deed called for by the contract, offering to pay for the land the agreed price of \$800—"and hereby offers to specifically perform said contract." Yet said Hurt refused and still refuses to convey the 6.5 acres of land in accordance with the terms of his contract.

The circuit court was of opinion that the introductory recital, "whereas, the party of the second part proposes to build a line of railway from the West Virginia State line, at or near New River, through Southern Virginia to Tidewater," was the chief inducement and principal consideration for the contract; that "courts of equity do not entertain bills for specific performance of contracts to build railroads and other works of improvement which require the exercise of skill and discretion in construction and the expenditure of large sums of money which it may be impossible to obtain;" and consequently the agreement was lacking in mutuality of remedy and a bill for its specific execution could not be maintained.

We cannot concur in that interpretation of the contract. Obviously, the paragraph quoted was merely by way of preamble and inducement, but does not constitute a covenant between the appellant and appellee that the former will build such a line of railroad. The covenants found in the body of the instrument are simple in character and reciprocal, specific and definite in terms. As remarked, they impose upon the appellant the obligation to locate the main line, or a branch of the proposed road, through the appellee's land; and the appellant is given the period of ninety days from the date of the contract at its option to demand a deed to the 6.5 acres of land; and, upon the execution by the appellee of a proper deed, to pay him \$800, the purchase price of the land.

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The agreement measures fully up to Mr. Justice Miller's definition of the requisites of a valid written contract of sale. It "contains within itself a description of the thing sold, by which it can be known or identified, of the price to be paid for it, of the party who sells it, and the party who buys it." *Grafton v. Cummings*, 99 U. S. 100, 106, 25 L. Ed. 366.

The amended bill distinctly alleges the performance by the appellant of the first of the foregoing requirements, also the giving of the required notice of its intention to demand the deed, and appellant's readiness to pay the purchase money upon the execution and delivery thereof by the appellee. Under such circumstances, there can be no possible obstacle in the way of specific performance of the contract. Indeed, the effort of the company to acquire the property for its uses by contract is made a condition precedent to the exercise of the power of eminent domain; and only in the event of inability to agree upon price or terms with the owner could the appellant resort to condemnation proceedings. Va. Code, 1904, sec. 1105-f, cl. 20. The legislature would not have imposed upon the appellant the useless ceremony of entering into a contract which could not be enforced.

At most, the prefatory language in regard to building the railroad was only a representation, an inducement to the contract, the truth or falsity of which would exert proper influence with the court in exercising a discretionary jurisdiction in the matter of granting or refusing specific performance. In this instance, the verity and good faith of the representation is established, so far at least as the demurrer is concerned, by the allegations, which may be here repeated, that at the date of the contract the appellant "was actively engaged in the construction of its proposed line of railway from the West Virginia line, at or near New River, through Southern Virginia to Tidewater; that its entire line of railway at that time had been let to contract, and was then being constructed, a large part of the work thereon having been completed."

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The pretension of the appellee involves the sophism, that the appellant cannot acquire the right of way until it builds its railroad, and cannot build its railroad until it acquires the right of way.

"Surely plaintiff will not be required to perform its contract which is not a condition precedent before it can call on defendants to perform theirs, which alone can secure plaintiff in the rights it acquired under the contract." *Minneapolis & St. L. Ry. Co. v. Cox*, 76 Iowa, 306, 41 N. W. 24, 14 Am. St. 216.

There is still another view of the case in which the appellant is entitled to prevail. The amended bill alleges part performance of the contract by the appellant, under circumstances which affect the conscience of the appellee, and his failure to carry out the contract would operate a fraud upon appellant's rights. *Lester v. Lester*, 28 Gratt. 737; *Stokes v. Oliver*, 76 Va. 72, 82.

It follows from these views that the decree appealed from must be reversed, and the case remanded for further proceedings.

*Reversed.*



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Syllabus.

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**Richmond.**

WALTON, WITTEN AND GRAHAM V. MILLER'S ADMINISTRATRIX,  
AND MILLER'S ADMINISTRATRIX V. NORFOLK AND  
WESTERN RAILWAY CO.

January 14, 1909.

1. NEGLIGENCE—*Parties—Joint Tort Feasors.*—When the negligence of two or more persons concurs in producing a single indivisible injury, then such persons are jointly and severally liable, although there was no common duty, common design, or concert of action. In the case at bar, the declaration alleges that the negligence and lack of ordinary care of an independent contractor and of a railroad company were the efficient and proximate cause of the death of the plaintiff's intestate, and this is sufficient to warrant their joinder as defendants in an action for his death, when the details of the negligence are specified.
2. NEGLIGENCE—*Sudden Peril.*—One who is placed in a position of sudden peril by the negligence of another, without contributory negligence on his part, is not liable for errors of judgment in endeavoring to escape the peril.
3. RAILROADS—*General Contractors—Blasting Near Track—Duty to Employees of Railroad Company.*—General contractors engaged in blasting and excavating in close proximity to a railroad track in daily use owe to the employees of the railroad company the twofold duty of using ordinary care not to obstruct the track, and, in the event they do obstruct it, to use like care to warn such employees of the obstruction in time to enable them, by the exercise of ordinary care, to protect themselves from danger, and the failure to discharge either duty constitutes actionable negligence.
4. RAILROADS—*Obstructions on Track—Duty of Flagmen.*—If an engineer of a locomotive engine on approaching a flagman gave the usual and ordinary signal in answer to the flag, and the flagman understood the signal as such answer, he had the right

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to presume that the engineer saw the flag and answered the warning and to discontinue the flagging, and this would bar a recovery for the engineer's death occasioned by not heeding the warning, although he did not see the flag or intend to answer it; but if the same signal was also used in response to communications from the conductor, and the flagman knew, or, by the exercise of ordinary care, ought to have known, that the signals given by the engineer were not in response to his flag, but to communications from the conductor, he was not justified in discontinuing flagging, and recovery is not barred.

5. **APPEAL AND ERROR—Verdict Supported by Evidence.**—The evidence in the case at bar, viewed as upon a demurrer to the evidence, fully sustains the verdict of the jury which was approved by the trial court, and the verdict cannot be disturbed on appeal.

6. **RAILROADS—Safe Track—Independent Contractors—Master and Servant.**—A railroad company is liable for the death of one of its employees occasioned by the negligent obstruction of its road-bed by an independent contractor employed to double-track its road. The duty to keep its track in a reasonably safe condition is non-assignable, and it cannot escape liability for the neglect of duties imposed upon it by law, in the interest of the safety of its servants and the public, by delegation to an independent contractor, or otherwise.

7. **APPEAL AND ERROR—Joint Tort Feasors—Contribution—Effect of Dismissal as to One.**—While joint tort feasors are jointly and severally liable, no right of contribution exists among them, and neither has a remedy over against the other. If they are proceeded against jointly, the plaintiff may dismiss or discontinue his action as to one defendant, without affecting his rights against the other. If judgment is against one, the other cannot have a writ of error to review it.

Error to a judgment of the Circuit Court of Bedford county in an action of trespass on the case by *Miller's Administratrix v. Walton, Witten and Graham* and *Norfolk and Western Railway Co.* There was a judgment in favor of the plaintiff against Walton, Witten and Graham, to which they assign error, and in favor of the Norfolk and Western Railway, to which the plaintiff assigns error. The two writs of error were heard together.

In the first case judgment

*Affirmed.*

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In the second case judgment

*Reversed.*

The opinion states the case.

*Harrison & Long*, for Walton, Witten and Graham.

*Lee & Howard* and *Whitehead & Whitehead*, for Miller's Administratrix.

*S. Griffin*, for Norfolk and Western Railway Co.

WHITTLE, J., delivered the opinion of the court.

Though these cases are before us on different writs of error, they arose out of the same accident, were made the subject of one action, and were jointly submitted on appeal.

The object of the suit is to recover damages from the plaintiffs in error, Walton, Witten and Graham, and also from the defendant in error, the Norfolk and Western Railway Company, for the death of the plaintiff's intestate, William J. Miller, which is ascribed to the negligence of both defendants.

The jury found a verdict for the plaintiff against Walton, Witten and Graham, and assessed her damages at \$7,500, but returned a verdict for the Norfolk and Western Railway Company; and judgment was rendered accordingly.

The first assignment of error by Walton, Witten and Graham is founded upon the court's action in overruling the demurrer to the declaration. On that assignment it is contended that the first and second counts of the declaration violate the rule of pleading which requires that the declaration in a joint action against tort-feasors must charge a joint tort; and, moreover, that inasmuch as the third and fourth counts allege a joint tort there is a misjoinder of counts. It is furthermore insisted that Walton, Witten and Graham did not owe plaintiff's intestate

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the same duty that was owing to him as an employee from the Norfolk and Western Railway Company, and for that reason the defendants are not suable jointly.

The gravamen of the first and second counts, indeed of all the counts stated in varying form, is that the railway company owned, maintained, and operated a line of road, extending, in part, between the cities of Roanoke and Lynchburg, in the State of Virginia; that with the view of widening its roadbed, for the purpose of double-tracking, the company employed Walton, Witten and Graham, a firm of railroad contractors, to excavate and remove large quantities of earth and rock along its right of way, for the distance of one mile in a westerly direction from Montvale, a station on the railroad; that, in the conduct of the work, heavy blasts were frequently made by the contractors, with dynamite and other high explosives, the effect of which was to cast large quantities of earth and rock upon the adjacent track; that it was the duty of the contractors to exercise reasonable care and diligence to warn employees of the railway company, engaged in operating and running engines and trains of cars over its track in the vicinity of the work, of such blasts, by the proper use of flags or torpedoes, or other reasonably practicable and adequate methods. A like duty is also imputed to the railway company, and it is alleged that, in consequence of the careless and negligent failure of the contractors and of the railway company to give such reasonable and timely notice, a freight train upon which plaintiff's intestate was employed as a locomotive engineer collided with earth and rock thrown upon the track by one of these blasts, and plaintiff's intestate was killed.

It will be observed that the negligence attributed to both defendants is alleged to have produced a single indivisible injury; and where such is the case the rule is that they are, in contemplation of law, joint tort-feasors, though acting independently of each other.

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The principle is thus stated in 1 Shear. & Red. on Neg., section 31: "If the injuries caused by the concurrent acts of two persons are plainly separable, so that the damage caused by each can be distinguished, each would be liable only for the damage which he caused; but if this is not the case, all persons who contribute to the injury by their negligence are liable jointly and severally for the whole damage."

Again, at section 122, it is said: "If several persons are jointly bound to perform a duty, they are jointly and severally liable for omitting to perform or for performing it negligently. Persons who co-operate in an act directly causing injury are jointly and severally liable for its consequences, if they acted in concert, or united in causing a single injury, even though acting independently of each other."

Judge Cooley, in his work on Torts, states the doctrine as follows: "In respect to negligent injuries, there is considerable difference of opinion as to what constitutes joint liability. No comprehensive general rule can be formulated which will harmonize all the authorities. The authorities are, perhaps, not agreed beyond this, that where two or more owe to another a common duty and by a common neglect of that duty such other person is injured, then there is a joint tort with joint liability. The weight of authority will, we think, support the more general proposition, that when the negligence of two or more persons concurs in producing a single indivisible injury, then such persons are jointly and severally liable, although there was no common duty, common design or concert of action." 1 Cooley on Torts (3rd ed.), p. 246. To the same effect see, 15 Enc. Pl. & Pr., 557, 558; *McKay v. So. Bell Tel. Co.*, 111 Ala. 337, 19 South. 696, 56 Am. St. Rep. 60, 31 L. R. A. 589; *Osage City v. Larkin*, 40 Kan. 206, 19 Pac. 658, 2 L. R. A. 56, 10 Am. St. Rep. 186; *Elec. Ry. Co. v. Shelton*, 89 Tenn. 423, 14 S. W. 863, 24 Am. St. Rep. 614; *Gulf, &c. Ry. Co. v. McWhirter*, 77 Tex. 356, 14 S. W. 26, 19 Am. St. Rep. 755;

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*Cuddy v. Horn*, 46 Mich. 596, 10 N. W. 32, 41 Am. Rep. 181, 182; *Transfer Co. v. Kelly*, 36 Ohio, 86, 38 Am. Rep. 558; *Flaherty v. M. &c. Ry. Co.*, 39 Minn. 328, 40 N. W. 160, 1 L. R. A. 680, 12 Am. St. Rep. 654.

All the counts contain the common allegation that the negligence and lack of ordinary care on the part of Walton, Witten and Graham, and the negligence and lack of ordinary care on the part of the Norfolk and Western Ry. Co., were the efficient and proximate cause of Miller's death; and that, under the authorities, renders both liable as joint tort-feasors, "although there was no common duty, common design, or concert of action" between them.

The second error assigned by Walton, Witten and Graham relates to giving and refusing instructions.

Thus the court refused an instruction which told the jury that Miller was under as high a duty to protect himself as the defendants were to protect him, and if they believed from the evidence that he could, by the exercise of reasonable care, have saved himself by getting off the engine before the collision occurred, and failed to do so, they must find for the defendants, although they may have believed that the defendants were negligent in giving him no notice of the obstruction. But the court, in lieu thereof, gave an instruction embodying the principle, that if the jury believed from the evidence that Miller was placed in a position of sudden peril by the negligence of the defendants, without contributory negligence on his part, he could not be held responsible for error of judgment with respect to effecting his escape, occasioned by such sudden peril, which instruction also contained the converse of that proposition.

The modification of the instruction, as originally offered, is objected to on the theory that there was no evidence to support it. But, as we shall see presently, the evidence was ample for that purpose.

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The ground of exception to the next instruction is that it imposed upon the contractors the twofold duty of exercising ordinary care not to obstruct the track, and, in the event they did obstruct it, to use like care to warn plaintiff's intestate of such obstruction in time to enable him, by the exercise of reasonable care, to protect himself from danger, and that the failure to discharge either duty would constitute actionable negligence. Certainly the law devolved both duties upon the contractor. Really the second is corollary to the first.

The next instruction told the jury that if they believed from the evidence that the flagman displayed his flag at a point where Miller could have seen it, if he had been on the lookout, in time to have prevented the collision, and while so displaying the flag Miller sounded two short blasts of the whistle, which was the proper and usual signal in answering the flag, and was so understood by the flagman, he had the right to assume that Miller saw the flag and answered the signal, and to discontinue flagging; and that this would bar a recovery, although Miller did not see the flag or intend to answer it. To which instruction the court added: But if the flagman knew, or, by the exercise of ordinary care, ought to have known, that the blasts were not in response to his flag, but to signals from the conductor, he was not justified in discontinuing flagging.

It appeared that two short blasts of the whistle was an answer to certain signals from the conductor as well as an answer to the flagging signal. In point of fact, the blasts in question were in response to the former and not to the latter, and the evidence of the plaintiff shows the relevancy and propriety of the court's addendum to the instruction.

The third assignment of error is to the refusal of the court to set aside the verdict against Walton, Witten and Graham as contrary to the law and the evidence. In dealing with that assignment, we shall content ourselves to give in brief outline

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the case made for the plaintiff, as upon a demurrer to the evidence.

It appears that for the distance of four miles west to the point of accident, the railroad traverses the eastern slope of the Blue Ridge Mountain on a heavy descending grade; that at the time of the accident a freight train of the railroad company, consisting of thirty odd loaded coal cars drawn by two engines was going east, at the rate of eight or ten miles an hour. The train was running under slow orders in approaching the part of the track near which the contractors were at work. These orders forbade a rate of speed in excess of twelve or fifteen miles an hour, and imposed upon the engineman the duty of keeping a sharp lookout for obstructions on the track and for flagging by the contractors, and to have his train under full control to stop promptly on signal. Plaintiff's intestate, as engineman on the front engine, had control of the air-brakes, and Ellett was in charge of the rear engine. Proper flagging consists in waving a flag across the track on the right side of the approaching train (the engineman's seat being on that side of the cab), in such manner as to attract attention, and at such distance from the point of danger as to enable the engineman to stop his train in time to avoid it.

Preparatory to setting off a blast, it was customary for the contractors to timber the contiguous track with cross-ties to prevent damage to the rails from falling rock. Usually, before this timbering was commenced, which in itself obstructed the track, flagmen were sent east and west to protect trains; the ordinary place for flagging east-bound trains being west of Brugh's crossing, which is 3,000 feet west of the scene of the accident. On that particular occasion, however, the flagman, a negro employed on the work, assisted in timbering the track, and was afterward ordered out with his flag. He set off on the right hand side of the track going west, on a run; and had proceeded about 1,500 feet with the flag rolled up when the train



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ran down upon him. Thereupon, he rushed across the track in front of the engine and up the bank on the opposite side, with his flag partly furled, as the front engine passed him. He was not seen by Miller, but was discovered by Ellett after he had crossed the track. Ellett instantly blew down-brakes, and Miller at once responded and did all in his power to stop the train. When he ran into the obstruction, sparks were flying from the locked wheels, the reverse lever was pulled entirely back against the pin, and the throttle was wide open, and the speed of the train had been reduced to three and a half or four miles an hour. The rear engine ran into the tender of the front engine and Miller was killed by the impact.

It also appeared that the train in question could hardly have been stopped with safety and certainty in less than a half a mile, or 2,640 feet.

It is needless to say, that the verdict of a jury, with such evidence to sustain it, sanctioned by the trial court, cannot be disturbed on appeal.

It only remains to notice briefly the exception to a line of instructions given by the court at the instance of the Norfolk and Western Railway Company, to the effect that, under the written contract between it and Walton, Witten and Graham, the latter were independent contractors, and that if they were well known railroad contractors of good reputation and standing, and the work to be done was lawful and not inherently dangerous, and was constructed by the firm under the contract, then the Norfolk and Western Railway Company would not be liable, though the death of the plaintiff's intestate was caused by the negligent failure of the contractors to give proper notice of the blast and of the obstruction occasioned thereby.

The railway company undertakes to justify that ruling on the authority of *N. & W. Ry. Co. v. Stevens' Admr.*, 97 Va. 631, 34 S. E. 525, 45 L. R. A. 367. In the latter case it was held not to be an essentially hazardous undertaking to substitute

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a new railroad bridge for an old one without the interruption of traffic; that it was the general custom of railroads to let such contracts to independent contractors; and, if the company used due care in the selection of a reliable contractor, it would not be liable for the negligence of such independent contractor in the faulty construction of the bridge.

It is sufficient to observe that the *Stevens* case rests upon its own particular facts, which are essentially different from the facts in this case, and was not intended to impair the established principle that a railroad company cannot escape liability for the neglect of duties imposed upon it by law, in the interest of the safety of its servants and the public, by delegation to an independent contractor or otherwise. It is the settled doctrine in this State that such duties are non-assignable.

In this instance the work of the contractors was not upon the main line, but they were engaged in grading a roadbed for a double track, parallel to but disconnected from the original track over which the company was operating its trains. If it were competent for a railroad company, under such circumstances, to delegate to a contractor the duty of supervising and maintaining part of its track it could relieve itself of all liability, simply by deputizing its non-assignable functions to an independent contractor.

In *Virginia Central Ry. Co. v. Sanger*, 15 Gratt. 230, this court said: "It would seem to me to follow further that when a railroad company, while using its track for the carriage of passengers, engaged in a work to be done on its road, and in the immediate proximity of its track, negligence in the performance of which would, in the estimate and opinion of cautious persons, involve the hazard of obstruction to the passage of its cars, it would be just as competent for them, in the case of an accident to a passenger caused by an obstruction arising from negligence in the performance of such work, to show merely that they had placed the work in the hands of a contractor, and

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that the obstruction was caused by the carelessness of one of his employees, as it would be for them, in the case of an accident to a passenger arising from want of care or skill in the management or conduct of the train, to show that such management and conduct had been let out to a contractor, and that the accident was due exclusively to the carelessness of one of his employees. In neither case, I apprehend, could such a deputation by the company of its powers and duties to another shield it against the complaint of an injured passenger."

That case was followed in *Carrico v. W. Va. Central, &c. Ry. Co.*, 39 W. Va. 86, 19 S. E. 571, 24 L. R. A. 50, where it was held, that a railroad company could not divest itself of the duty of keeping its track in good and safe condition, free from obstructions, by the interposition of an independent contractor.

See *Richmond, &c. Street Ry. Co. v. Moore*, 94 Va. 493, 27 S. E. 70, 37 L. R. A. 258; *Southern Ry. Co. v. Newton*, 108 Va. 114, 60 S. E. 625; *Borrow v. Kane*, 88 Fed. 197, 31 C. C. A. 452; *Barkman v. Pa. Ry. Co. (C. C.)*, 89 Fed. 453; *Taylor, &c. Ry. Co. v. Warner*, 88 Tex. 642, 37 S. W. 868.

Our conclusion upon this branch of the case, therefore, is that though the lower court erred in giving these instructions, which practically absolved the railway company from liability for its own negligence with respect to obstructions on its track, for which error the judgment in its favor must be reversed, it is not an error of which Walton, Witten and Graham can complain; the rule being, that joint tort-feasors are jointly and severally liable, but that no right of contribution exists among them, or remedy over by one against the other. Consequently, if proceeded against jointly, the plaintiff may dismiss or discontinue his action as to one defendant, without affecting his rights against the other. *Staunton Mutual Telephone Co. v. Buchanan*, 108 Va. 810, 62 S. E. 928.

For these reasons the judgment in favor of Miller's administratrix against Walton, Witten and Graham is affirmed; but

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the judgment on behalf of the Norfolk and Western Railway Company is reversed, the verdict of the jury as to that defendant set aside, and the cause remanded for further proceedings.

In first case

*Affirmed.*

In second case

*Reversed.*

## Syllabus.

**Richmond.**

## YOUNG AND OTHERS v. YOUNG AND OTHERS.

January 14, 1909.

Absent. Cardwell, J.

1. **WILLS—License to Sell Timber—Estate in Timber.**—Under a will giving to a person the right to sell any timber on a given tract of land, only a license to sell the timber passes to such a person. No estate or property in the timber itself is created until it is actually severed from the freehold.
2. **WILLS—Devise of Definite Portion of a Large Tract—Election.**—A devise of twelve acres, part of a tract of upwards of four hundred acres, without specifying its location, is a good devise, and the devisee has the right to elect from what portion of the larger tract it shall be taken.
3. **WILLS—Devise of Part of Larger Tract—Election—When to Be Made—Laches—Election After Sale—Share of Purchase Money. Partition.**—A devisee who has the right to elect from what part of the larger tract he will take a definite portion thereof devised to him, may make his election to be compensated out of the purchase money after the land has been sold in a partition suit brought for the purpose, and before distribution of the proceeds, where it does not appear that the delay has not operated prejudicially to any of the parties in interest, or that it has interfered with or rendered more difficult a proper disposition of the controversy. He has the right to compensation on the basis that his portion was assigned from the most valuable part of the tract.
4. **APPEAL AND ERROR—Objection for First Time in Appellate Court—Failure to Assign Error.**—This court will not pass upon alleged errors in the report of a commissioner in chancery where the report was confirmed without exception or objection in the trial court, and no error is assigned with respect to it in the petition for appeal.

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5. JUDICIAL SALES—*Compensation of Commissioner—Counsel Fees.*—

The compensation to a commissioner for selling land and collecting and paying over the purchase money is fixed by section 3404 of the Code, which declares that no greater commission shall be allowed, and the fee already received by counsel for the parties in this cause is adequate compensation for the services rendered.

6. EVIDENCE—*Experts—Extra Compensation.*—An expert who gives his opinion as to the value of timber on a tract of land, but who is not shown to have been at any expense of time, labor or otherwise, in preparing himself to testify, is not entitled to extra compensation.

Appeal from a decree of the Circuit Court of Chesterfield county. Appeal by the complainant and one of the defendants.

*Reversed.*

The opinion sufficiently states the case on all points except as to the extra compensation claimed by the expert witness. On this point the expert testified that he had been a "timber estimator for about 25 years" and that he had examined the wood and timber on the farm mentioned in the bill, and had made a detailed report of such examination, giving his valuation of said wood and timber. He was not questioned as to time or labor expended in making the examination and report, but the following question was asked and answer given:

Q. "In coming here to testify as an expert is your charge more than the usual witness fee? If so, file your bill with the commissioner."

A. "Yes, my charge is \$10.00."

*Frank T. Sutton, Jr.*, for the appellants.

*C. L. Page* and *A. X. Montiero*, for the appellees.

KEITH, P., delivered the opinion of the court.

The bill in this case was filed by W. J. Young, one of the

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devises of Sarah Young, deceased, for the construction of her will, settlement of her estate, the partition or sale of her real estate, and the distribution of the proceeds among those entitled thereto. All persons in interest were made parties defendant, and the court entered a decree, which is now before us for review.

The will to be construed is as follows:

"I, Sarah F. Young, declare this to be my last will and testament at my death:

"1st. The east side of my farm to be sold first to pay of my indebtedness.

"2nd. I gave the right to S. E. Young, D. S. Young and W. J. Young the right to sell *any* timber or wood on my farm my three children.

"3rd. I bequeath to Lucy Atkisson, my daughter, fifty dollars or  $12\frac{1}{2}$  acres of land from my estate.

"4th. I have given to my daughter, M. S. Adams, all that I intend to give her from my estate, the house in *which* she now resides in and  $59\frac{1}{4}$  of land.

"4th. I give to W. S. Young, my grandson, 25 acres of land from my estate.

"5th. I give to S. E. Young, D. S. Young and W. J. Young, my three children, all of my household effects.

"6th. I want my place to be a home for my three children, S. E. Young, D. S. Young and W. J. Young, and my grandson, W. S. Young. I request the *court* to let my son, D. S. Young, to settle up my estate without security."

The court was of opinion that under the second clause of the will only a license to sell timber passed to the person therein named, but that it created no estate or property in the timber itself until it was actually severed from the freehold; and in this we are of opinion that the circuit court was plainly right.

*Hodgson v. Perkins*, 84 Va. 706, 5 S. E. 710; *Barksdale v. Hairston*, 81 Va. 764; and *Keystone Lumber Co. v. Kolman*,

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94 Wis. 465, 69 N. W. 165, 34 L. R. A. 821, 59 Am. St. 905, where it is held, that a license to cut and sell timber does not vest title in the licensee prior to the severance of such timber. *Macomber v. Detroit, &c. R. Co.*, 108 Mich. 491, 66 N. W. 376, 32 L. R. A. 102, 62 Am. St. 713.

It is assigned as error, that the circuit court allowed D. S. Young, as assignee of Lucy Atkinson, only \$4 per acre for the 12½ acres devised under the third clause of the will, and at the same time allowed W. S. Young \$90 an acre for the land devised to him under the fourth clause of the will.

In Jarman on Wills (6th ed.), p. 361, it is said: "Where the gift comprises a definite portion of a larger quantity, it is not rendered nugatory by the omission of the testator to point out the specific part which is to form such portion, the devisee or legatee being in such case entitled to select, by which means the subject of the gift is reducible to certainty; and *id certum est quod certum reddi potest* is a settled rule in the construction of wills. Thus, if a man devise two acres out of four acres that lie together, it is said that this is a good devise, and the devisee shall elect."

See also *House v. Ewer*, 37 N. J. Eq. 368; *Love v. Stiles*, 25 N. J. Eq. 381; *Youmans v. Youmans*, 26 N. J. Eq. 149.

The principle established by these authorities is not disputed by appellants, but their contention is (1) that Walter S. Young, by his laches in failing promptly to assert his right, had lost it; and (2) that the facts established in the record do not sustain the decree as to the amount to which Walter S. Young is entitled.

We do not think the position of appellants well taken with respect to the laches of Walter S. Young. It is true his answer was not filed until after the court had ascertained that the real estate was not susceptible of division, had decreed a sale, and a sale had actually been made. His answer was filed, however, before there was any distribution of the pro-



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ceeds. It does not appear that the delay has operated prejudicially to any of the parties in interest, or that it has interfered with or rendered more difficult a proper disposition of the controversy. There is nothing in the facts proved which shows that Walter S. Young could have selected 25 acres in kind, so as to protect his own interest and at the same time inflicted less injury upon others than follows from the course which has been in fact pursued. He had, then, the right to make the selection, it has not been lost by his laches or his acquiescence, and the only question which remains is, does the evidence support the decree in his favor?

The matter was referred to a commissioner, who reported that he was entitled to the value of 25 acres of land at \$90 per acre. It is true that the land appears to have been of very unequal value, its chief element of value consisting in the wood and timber upon portions of it; and the report of the commissioner appears to have been rested to a great extent, if not wholly, upon the testimony of J. L. Duval. This witness, after stating that he estimated the value of the timber upon the entire tract at \$7,070, which would give an average value per acre of timber of \$17, was asked this question:

"Can you say approximately how many acres in the whole tract were heavily timbered, and what you would regard as a fair average value per acre of that portion? A. I cannot give the acreage on it, but there are acres of timber next to Robious which would cut 20,000 feet per acre. If there were a sufficient quantity of it, it would be worth from \$4 to \$5 per thousand feet on the stump. I mean if it were enough to justify an independent location for a sawmill, and I think there is enough for a small sawmill."

We do not think this evidence sufficient to sustain the decree. It does not establish that there were 25 acres from which 20,000 feet per acre could be cut, worth from \$4 to \$5 per thousand feet on the stump. The witness expressly declines

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to make any such estimate, and it is a mere leap in the dark to undertake to make it for him. We think, in this respect, the decree is erroneous.

We are further of opinion that the same principle which allowed W. S. Young to select 25 acres, under the fourth clause of the will, equally entitles the assignee of Lucy Atkinson to make selection of  $12\frac{1}{2}$  acres, under the third clause of the will; so that there should be an inquiry as to what would be the value of  $37\frac{1}{2}$  acres of the most valuable land of the estate of Sarah F. Young, of which 25 parts should be given to Walter S. Young and  $12\frac{1}{2}$  parts to the assignee of Lucy Atkinson.

Under the sixth clause of the will, the decree appealed from holds that the devisees therein named took a fee simple.

Without expressing any opinion as to the correctness of this ruling, we shall content ourselves with saying that the commissioner reported that he had entertained grave doubts upon the subject, but had finally concluded to report that the devisees named in this clause took an absolute estate; that in reaching this conclusion he was in large measure influenced by the fact that Mrs. Adams and Mrs. Wilkinson in their answers disclaim any interest under this clause, and they alone could have an interest adverse to the parties therein named. The report of the commissioner with respect to this matter was not excepted to; the decree confirmed the report; and there is no error assigned with respect to it in the petition.

It is assigned as error, that the decree appealed from allows J. M. Gregory an attorney's fee of \$300, when he had already received on account of fee \$200, and as special commissioner of sale the sum of \$220.

This matter was referred to a commissioner, with directions to report what further fee, if any, J. M. Gregory is entitled to for such services; which the commissioner answers as follows: "Your commissioner respectfully submits those two questions to the determination of the court, upon the record

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and the evidence of said Gregory, returned with the report; but your commissioner thinks from the best consideration he can give the matter, that he should have a further fee of about \$300.00, but he submits to the court what proportion of this should be borne by the parties he at present represents."

This was a suit in chancery for the partition or sale of certain real estate among the parties entitled. The only question involving any difficulty arose upon the claim of Walter S. Young, and that led to no serious litigation. We see nothing in the record which an attorney was called upon to do for which the sums already paid to Mr. Gregory were not an adequate remuneration. He received in fees as an attorney \$200, and \$220 as a commissioner of sale; and the whole of his evidence before the commissioner upon his request or claim for additional compensation as attorney is addressed to the difficulty which he had to overcome, the service which he rendered, and the increased price he obtained for the land by his vigilance and activity in the discharge of his duties as a commissioner. But with respect to his compensation as commissioner, the statute law of this State is explicit.

Section 3404 of the Code provides: "For the services of commissioners or officers under any decree or order for a sale, including the collection and paying over the proceeds, there shall not be allowed any greater commission than five *per cent.* on the first three hundred dollars received by them, and two *per cent.* on all above that. And if a sale be made by one commissioner or officer, and the proceeds be collected by another, the court under whose decree or order they acted, shall apportion the commission between them as may be just." *Womack v. Paxton's Ex'ors*, 84 Va. 9, 5 S. E. 550.

We are of opinion that there was no error in the refusal of the court to allow J. L. Duval a fee of \$10 as an expert witness.

The decree appealed from must be reversed, and the cause remanded to be further proceeded in, in accordance with this opinion.

*Reversed.*

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Syllabus.

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## COUNTY OF LOUISA V. YANCEY'S TRUSTEE AND OTHERS.

January 21, 1909.

1. **APPEAL AND ERROR—*Appeal from County Court to Circuit Court—Review—Jurisdiction.***—On a writ of error from this court to a circuit court, this court has jurisdiction to review the action of the circuit court and to determine whether or not it had jurisdiction of a writ of error from that court to the county court, and, if it had not, to reverse its judgment and enter such judgment as the circuit court ought to have entered. It is not assignable as error, therefore, in this court that the writ of error from the circuit court to the county court was not perfected within the time prescribed by law.
2. **APPEAL AND ERROR—*Perfecting Appeal—Time Deducted—Objections for First Time in Appellate Court.***—Whether a writ of error from a circuit court to a county court was perfected within the time prescribed by law depends, among other things, upon the time which had elapsed between the presentation of the petition for the writ and the delivery of the record and petition to the clerk of the appellate court, which time is to be deducted. If the case was argued in the circuit court, made a vacation case by consent, and submitted to the court for decision, without making the objection that the writ of error was not perfected within the time prescribed by law, and the record is silent as to the time to be deducted as above mentioned, the objection that the writ of error from the circuit court to the county court was not perfected in due time cannot be raised for the first time in this court.
3. **APPEAL AND ERROR—*Instructions—Invited Error.***—Although an instruction requested by a defendant was not given by the trial court, yet if it did instruct upon that point as requested by the defendant, he cannot complain, on a writ of error, of the ruling of the trial court on that point. If error was committed, it was invited by him.
4. **VERDICTS—*Excessive—Case at Bar.***—If, in an action against a county to recover for the value of goods furnished to persons

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in quarantine, it appears that fifteen persons were in quarantine, for only nine of whom the county was responsible, that no account was kept of the goods furnished or used by them, and it is not shown what any of them used, a verdict for the plaintiff for more than nine-fifteenths of the amount claimed as furnished to all of them will be set aside as excessive.

5. **NUISANCE—Destruction of Dangerous Property—Liability of Counties.**—A county is not liable for property destroyed as a dangerous nuisance by the local board of health. Section 1713d of the Code (1904) authorizes the local board of health to see to the abatement of nuisances, but neither that section, nor any other statute, makes the county liable for the value of property destroyed as a nuisance, and in the absence of such a statute there can be no recovery therefor.
6. **CONSTITUTIONAL LAW—Eminent Domain—Public Use—Police Power—Destruction of Property as a Dangerous Nuisance—Destroying property because it is a dangerous nuisance is not an appropriation to a public use, but is to prevent its use by the owner, and end its existence because it cannot be used by the owner without injury to others. In abating such nuisances, the public does not exercise the power of eminent domain, but the police power.**

Error to a judgment of the Circuit Court of Louisa county. There was an appeal from the board of supervisors of the county to the county court, and a judgment was rendered against the county. To this judgment a writ of error was awarded by the circuit court which reduced the judgment of the county court by \$115, and as amended affirmed it. To this judgment the county of Louisa assigns error.

*Reversed.*

The opinion states the case.

*Gordon & Gordon*, for the plaintiff in error.

*W. C. Bidd*, for the defendants in error.

BUCHANAN, J., delivered the opinion of the court.

Before the argument of this case upon the merits, the defendants in error moved the court to dismiss it upon the ground

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that the writ of error granted to the judgment of the county court by the circuit court was not perfected within the time provided by statute.

If this were true, it furnishes no ground for dismissing this writ. The writ of error granted by this court was perfected within the time prescribed by law, and it, therefore, has jurisdiction to review the action of the circuit court and to determine whether or not it had jurisdiction; and, if it had not, to reverse its judgment and enter such judgment as the circuit court ought to have entered. If, on the other hand, it appears that the circuit court had jurisdiction, it will be the duty of this court to pass upon the errors assigned in the petition for the writ of error to this court.

The ground upon which it is claimed that the circuit court was without jurisdiction is, that the judgment of the county court was rendered on the 18th day of August, 1903, and the writ of error to that judgment was not awarded until the 14th day of September, 1904, or at least that no bond was executed until after that date.

It appears that an application was made to Judge Mason on or before January 7, 1904, of whose circuit the county of Louisa was then a part, and he was of opinion that the petitioner had an appeal as a matter of right, and that it should be docketed in the circuit court for that county where it would be heard *de novo*. Subsequently, a writ of error without date was awarded by Judge Grimsley, to whose circuit the county of Louisa had been transferred, but the writ was not to take effect until the bond required should be executed. On the 14th day of September, 1904, an order was entered by the circuit court, striking the case from the docket as improperly thereon, but awarding a writ of error, not to take effect, however, until the bond required by the order was executed. On the 14th of November following, an order was entered by consent of parties making the case a vacation cause, stating that "the writ of error granted in this case failing to show when the petition

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for the writ was presented to the judge of this court, the court doth further order that the clerk of the court enter upon said petition that it was presented to him on the 10th day of May, 1904, the court being satisfied that the said petition for a writ of error was presented on that day and the writ of error granted the following day."

When the case was argued in the circuit court, made a vacation case by consent, and submitted to the court for decision, no question was raised as to the jurisdiction of the circuit court because the writ of error had not been perfected within the time prescribed by law. If it had been, the plaintiff might have been able to show that the bond had been executed within a year after the judgment of the county court had been rendered, after deducting the time which elapsed between the presentation of the petition for the writ of error and the delivery of the record with the petition to the clerk of the appellate court. Code, secs. 3470, 3474. How long this was does not appear from the record, and for its non-appearance the petitioner was not responsible.

The question of whether or not the writ of error was perfected within the time prescribed by law being one which might have been affected by matters not appearing in the record, ought to have been raised in the circuit court. Not having been done, it is too late, under the facts and circumstances of the case, to raise it here for the first time.

It appears that the claimant and his brother, in the year 1902, were doing a general merchandise business at Green Spring, in the county of Louisa, under the name and style of Yancey Brothers. The business was conducted in a room of the same building in which the claimant and his family resided. Small-pox having broken out in his home, the house was quarantined. In addition to his own family and employees, other persons were quarantined or kept in the building, and all were supported and maintained during the time

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they were there out of the said store, by direction of the physician in charge. Some of the goods were destroyed by direction of the board of health. The goods not so used and destroyed were greatly depreciated in value because of the existence of the small-pox in the building and the use made of the building during that time.

The claimant, as surviving partner, presented a claim against the county, amounting to \$2,777.78, made up of the following items:

## "STATEMENT OF ACCOUNT FILED BY YANCEY BROS.

Goods from store used for hospital purposes by order of Dr. May, as per itemized statement herewith filed .....	\$406.86
Goods destroyed by board of health, as per itemized statement herewith filed .....	196.35
Rent of house as hospital, 3 $\frac{1}{4}$ months .....	81.25
Loss of use of storehouse for the remainder of lease, by reason of being made a hospital, 12 $\frac{3}{4}$ months .. . . .	183.75
3 months compensation as postmaster, express and depot agent, by reason of establishing as a detention house of the hospital, three months, at \$25.00 per month .....	75.00
Loss of stock while under control of the county..	522.07
Depreciation of stock by the reason of the use of building for hospital purposes .....	500.00
Damage in loss of actual profits from enforced suspension of mercantile business by order of board of health, in conjunction with board of supervisors during the establishment of hospital in the building and the continuance of the quarantine and the assumption of absolute control of said property by said board .....	812.50

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\$2,777.78"



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Of this sum the board of supervisors of the county allowed \$92.75 for goods actually destroyed and articles purchased by the county authorities, and rejected the residue of the claim. From that action of the board of supervisors both parties appealed to the county court.

Upon the trial in that court, the jury were instructed that there could be no recovery against the county for any part of the claimant's account, except as to the item for goods furnished from the store for hospital purposes and articles destroyed by order of the board of health; and as to these items the court instructed the jury as follows:

"1. As to the item of \$406.86, for goods from store used for hospital purposes, by order of Dr. May, as per itemized statement herewith filed, the plaintiff is entitled to recover only the amount of the value of such items of such goods as were used by Dr. May, and were supplied by his order to, and used by or for parties other than by the plaintiff, Lewis Yancey, his brother, sisters and employees, such value to be determined by the jury upon the evidence as of the time such goods were so supplied and used, and the burden of proof is upon the plaintiff to show what amount of such goods were so supplied and used, and said value thereof, the defendant, the said county of Louisa, not being liable to said plaintiff for such goods as were used by or for him, his brothers, sisters and employees.

"2. As to the item of \$196.25, for goods destroyed by board of health, as per itemized statement herewith filed, the plaintiff is entitled to recover the amount of the value of such items of such goods as were destroyed by such board, or by order of Dr. May, which are not covered by the items of the account allowed by the board of supervisors of Louisa county, such value to be determined by the jury upon the evidence as of the time such goods were so destroyed, and the burden of proof is upon the plaintiff to show such value."

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Under these instructions the jury found a verdict for \$466.49, of which sum \$270.64 was for goods used for hospital purposes, and \$195.85 for goods destroyed by the board of health. The county court entered judgment for the amount of the verdict, and to that judgment the circuit court granted a writ of error, upon the petition of the county.

That court being of opinion that there was no error in the judgment of the county court, except as to the sum of \$115, the value of a box of shoes destroyed by order of the board of health, reduced the judgment to that extent, and as amended affirmed it.

To that judgment this writ of error was awarded.

The errors assigned here are in substance, that the county is not liable either for the goods destroyed or for the goods furnished for hospital or quarantine purposes; or, if liable at all for goods furnished, it is liable only so far as they were used to support and maintain persons in quarantine other than the claimant's family and his employees; and that there is no proof showing what goods were so used.

The question of whether or not the county is liable for goods used in supporting and caring for persons in quarantine cannot be raised here. The county court held that the county was not liable for them so far as used for the maintenance of the claimant's family and employees. As to the other persons in quarantine, the county conceded by its instruction No. 4 that it was liable for goods furnished, so far as it was proved that they were used for the purpose of maintaining persons in quarantine other than the claimant's family and employees. While the instructions offered by the county were not given, the county court did instruct upon that point as the county had asked. The county cannot now be heard to complain of that instruction of the court upon that question.

But as it asked the court to set aside the verdict of the jury as contrary to the evidence, the question does arise, whether

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or not the evidence shows what goods were used for that purpose.

It is impossible to ascertain from the evidence how the jury fixed the liability of the county for goods furnished at \$270.64. No account of the goods furnished for or used by the persons in quarantine was kept. It is not shown what any of them used. If in the absence of any such evidence the jury would have been justified in concluding that each person in quarantine used and received the benefit of an equal share of the goods furnished from the store, not over 9/15 of the goods so used could have been chargeable to the county; and yet the sum ascertained is in excess of that sum.

The next question is whether or not the county is liable for the goods destroyed by the local board of health.

By section 1713d of the Code, the local board of health was authorized, among other things, to see to the abatement of nuisances. But there is no provision in that section or elsewhere in our statute law which makes the county liable for the value of property destroyed as a nuisance by the local board of health, and without such a statute it seems to be well settled that there can be no recovery against a city, and still less against a county.

Mr. Dillon, at section 956 of his work on Municipal Corporations, says: "Municipal corporations, or certain officers thereof, are sometimes appointed, by charter or statute, agents to judge of the emergency, and direct the performance of acts which any individual might do at his peril, without any statute at all. And by the statute or charter, such corporations are not unfrequently made liable for damages which individuals may sustain for buildings or property which are destroyed, under the direction of the proper officers, to prevent the extension of a fire. The liability of the municipal corporation in such cases is purely statutory, and therefore, in order to charge the corporation, the case must be clearly and fairly within the enactment."

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The rule, as laid down by Mr. Dillon, is fully sustained by the decisions, and applies to many other cases besides fire—some of them, as was said in *Bowditch v. Boston*, 101 U. S. 16, 25 L. Ed. 980, “involving the destruction of life itself, where the same rule is applied. \* \* \* In those cases the common law adopts the principle of the natural law and finds the right and the justification in the same imperative necessity.” See *Field v. Des Moines*, 39 Iowa, 575, 18 Am. Rep. 46, where many cases on the subject are collected; *Dunbar v. Augusta*, 90 Ga. 390, 17 S. E. 907.

It is also well settled that destroying property because it is a dangerous nuisance is not, as seems to be contended in this case, an appropriation of it to a public use, “but is to prevent any use of it by the owner, and end its existence because it could not be used consistently with the maxim, *sic utere tuo ut alienum non laedas*,” and that in abating nuisances the public does not exercise the power of eminent domain but the police power. *Dunbar v. Augusta*, *supra*; *Field v. City of Des Moines*, *supra*, and cases cited.

We are of opinion, therefore, that the county was not liable for any part of the goods destroyed by the local board of health, and that the county court erred in not so instructing the jury.

We are further of opinion that it erred in not setting aside the verdict of the jury upon that ground, and also upon the ground that the verdict is not sustained by the evidence as to the value of the goods furnished to the persons in quarantine other than the family and employees of the claimant.

The judgments of the circuit court and of the county court must each be reversed, the verdict of the jury in the county court set aside, and the cause remanded to the circuit court for a new trial to be had not in conflict with the views expressed in this opinion.

*Reversed.*

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Syllabus.

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**Richmond.**

AMERICAN LOCOMOTIVE CO. AND OTHERS v. WHITLOCK.

March 11, 1909.

Absent, Keith, P., and Cardwell, J.

1. MASTER AND SERVANT—*Notice of Obvious Dangers—Risk of Employment.*—The law does not make it the duty of a master to warn a servant of an open and obvious danger of which he knows, or could have known by the exercise of ordinary care. Such dangers are risks incident to the employment.
2. INSTRUCTIONS—*Conflicting.*—A material error in an instruction complete in itself is not cured by a correct statement of the law in another instruction. The two being in conflict, the verdict of the jury will be set aside, as it cannot be told by which instruction the jury was controlled.
3. INSTRUCTIONS—*Partial View of the Evidence.*—An instruction which directs a finding for the plaintiff upon a hypothetical case stated therein is erroneous if it leaves out of view all of the evidence tending to prove a state of facts upon which there is no liability upon the defendant.
4. EVIDENCE—*Prior Inconsistent Statement of Witness—When Admissible.*—Prior inconsistent statements of a witness may be given in evidence to impeach his credibility, but for no other purpose.
5. INSTRUCTIONS—*Insufficient Evidence to Support.*—Since the abolition of the *scintilla* doctrine, an instruction ought not to be given when the evidence upon which it is based is clearly insufficient to sustain a verdict.
6. INSTRUCTIONS—*Jury Fully Instructed.*—It is not error to refuse further instructions when the instructions already given fully and fairly submit the case to the jury on the phases sought to be presented.

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Opinion.

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Error to a judgment of the Circuit Court of the city of Richmond in an action of trespass on the case. Judgment for the plaintiff. Defendants assign error.

*Reversed.*

The opinion states the case.

*McGuire, Reily & Bryan*, for the plaintiffs in error.

*Meredith & Cocke*, for the defendant in error.

BUCHANAN, J., delivered the opinion of the court.

This is an action to recover damages for personal injuries caused, as alleged, by the negligence of the defendants (plaintiffs in error) in whose service the plaintiff was employed as a carpenter.

The defendants operate a manufacturing establishment in the county of Henrico, consisting of a number of large shops. One of them, known as the "shovel shop," in which the plaintiff was injured, had been erected a short time before the accident, but had not been entirely completed. This shop was a structure 340 feet in length and 100 feet in width, divided into three aisles running the entire length of the building, and in each aisle there was operated a crane, weighing some thirty thousand pounds, and running on tracks at an elevation of about 20 feet. The tracks are laid on large iron girders supported by pillars about 20 feet apart, running from the floor up, and extending outside of and beyond the girders towards the roof of the shop. The bridge of the crane is 47 feet in length, extending from one track to the other, and rests and runs upon iron wheels about two feet in diameter. Suspended from the body of the crane, between the tracks, is a cage six or eight feet in diameter, in which stands the man who operates the crane. Between the parallel beams composing the crane

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bridge or frame runs a trolley, to which is attached a chain and hook. By moving this trolley from one side of the bridge to the other, the weights attached to the hook are moved from one side of the aisle to the other side. The crane is moved up and down the track by electric power.

At the time of the accident, the line shafting to be used in the building had not been completed, though the crane had been in operation for some weeks in placing machinery in the building, and in packing locomotives for shipment. The line shafting was supported by hangers which were attached to wooden bridge-trees. The bridge-trees extended from the girders which supported the tracks of the cranes on the east and west sides of the shop to "I" beams running parallel with the girders, the distance from the centre of the track to the centre of the "I" beam being between five and six feet. Between each of the pillars upon which the girders rested and the "I" beam there was framing consisting of iron beams, strut, wooden hangers and bridge-trees.

On the morning the plaintiff was injured, he had been ordered by the foreman of the carpenters to go with another employee and assist in putting up hangers, which were the wooden parts of the bridging that ran along outside of the eastern girder and rail of the track of the western crane. Whilst the plaintiff and the carpenter whom he was directed to assist were engaged in that work, he was struck or caught by the western crane, which was being operated that morning, and dragged some fifteen feet, when to save himself from being carried against one of the pillars south of him, he caught hold of a piece of framing with his left hand and seized the track with his right hand, involuntarily as it seems, and the crane wheels passed over a part of that hand, cutting off three fingers.

No warning had been given the operator of the crane that the plaintiff and his associate were at work near, but on the outside of the track of the crane, nor to the plaintiff that the

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crane was approaching. The failure on the part of the defendants to give such warning, or to keep a lookout, it is insisted by the plaintiff was negligence, because of the danger of the situation in which he was working and the existence of a custom that such warning should be given.

The defendants on the other hand, deny that there was such a custom, and claim that it was not their duty to warn the plaintiff of the movement of the crane, since any danger to him from that source was open and obvious.

Upon this question the court gave instructions Nos. 1 and 2, asked for by the plaintiff. The giving of each is assigned as error.

Instruction No. 1 is as follows: "The jury are instructed that it was the duty of the defendants to exercise reasonable and ordinary care to furnish Hilary L. Whitlock a reasonably safe place in which to do the work required of him, and to protect him when exercising on his part reasonable and ordinary care under the then existing conditions and surroundings against an accident or injury from the running or operating of the car or traveller of the crane, as could have been reasonably foreseen; and to that end, if the place in which he was required to be in the performance of his work, or in going to or from the same, would in reasonable probability become dangerous by reason of any perils arising from the running or operating said traveller, it was the duty of the defendant to use some reasonable and proper means commensurate with such danger by giving him notice of the approach of said traveller, or otherwise, to give him reasonable protection when exercising on his part reasonable and ordinary care under the then existing circumstances, from being struck by the said traveller. If the jury believe from the evidence that the defendants failed to perform such duty, and that the said Hilary L. Whitlock was injured as alleged in the declaration by reason of such failure to perform said duty, then they must find for



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the plaintiff, unless they believe that the said H. L. Whitlock failed to exercise reasonable and ordinary care under the conditions and circumstances surrounding him, with his knowledge or opportunity of knowledge thereof to protect himself from being run against or struck by said traveller and injured."

The objection made to that instruction is that it imposed upon the defendants the duty of warning the plaintiff of the movements of the crane, when the danger to him from such movements were open and obvious, and were therefore known, or could have been known to him by the exercise of ordinary care.

The evidence tended to prove that the place where the plaintiff was working the morning he was injured was not necessarily dangerous from the movements of the crane. It was outside of the area over which the crane passed, and the plaintiff was in no danger from its passing back and forth by him, unless he placed some portion of his body inside the area over which the crane moved. On the day before the accident, he was doing similar work on the eastern side of the shop, and while working there placed himself in a position of danger from the crane, and, being seen by the operator of the crane, it was stopped, and he was told to get out of the way. On the morning that he was injured, the crane passed the place where he was working at least six times, though during that time, which was between one and two hours, the plaintiff was twice absent a few minutes getting tools. The crane by which he was injured had been in operation for some three weeks, placing machinery and packing engines, moving over the track at irregular intervals.

From these and other facts which the evidence tended to prove, the jury might have believed that the danger from the passing crane was open and obvious, and that the plaintiff knew, or by the exercise of ordinary care could have known, of the danger and avoided it. If the danger was open and

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obvious, then it was one of the risks incident to the employment, and the law did not make it the duty of the defendants to warn the plaintiff of such danger. *N. & W. Ry. Co. v. Donally*, 88 Va. 853, 14 S. E. 692; *Locomotive Works v. Ford*, 94 Va. 627, 27 S. E. 509; *Gay v. Southern Ry. Co.*, 101 Va. 466, 470, 44 S. E. 707.

We are of opinion, therefore, that instruction No. 1 was erroneous in this respect.

But it is insisted that even if it was erroneous, the error was cured by instruction No. 4, given for the defendant. The two instructions are inconsistent, upon a very material question in the case. The fact that No. 4 correctly stated the law does not cure the error of No. 1, which was a complete instruction in itself, and may have controlled the jury in their finding. *Virginia, &c. Co. v. Chalkley*, 98 Va. 62, 34 S. E. 976; *N. & W. Ry. Co. v. Mann*, 99 Va. 180, 37 S. E. 849; *Norton Coal Co. v. Hanks*, 108 Va. 521, 62 S. E. 335.

Instruction No. 2, given at the request of the plaintiff, is objected to upon the same ground as No. 1, and upon the additional ground that there was no evidence upon which to base it.

That instruction is as follows: "If the jury believe from the evidence that it was the custom of the defendants when ordering an employee to do work in such close proximity to the track upon which the traveller was run as to be in danger of being struck by same when so at work to notify the floorman in control of such crane of such presence of such employee so at work, in order that such floorman could so control such running of such traveller as reasonably to protect such employee so at work when said employee was exercising ordinary care under the surrounding circumstances from being struck by said traveller when being operated, and that such custom was a precaution reasonably necessary to give such employee reasonable protection against said traveller, and shall further

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believe that, when the said Hilary L. Whitlock was required to do the work directed, he was placed in such dangerous proximity to said traveller, and that the defendant failed to give said floorman notice of such presence of said Whitlock so at work, and took no other means to let said floorman know of such presence of said Whitlock, and that said floorman did not know of such presence, then they must hold that the defendants were guilty of negligence in so acting, and if they believe that the said Whitlock was injured, as alleged in the declaration, by reason of such negligence, they must find for the plaintiff, unless they believe that the said Whitlock failed to exercise reasonable and ordinary care under the conditions and circumstances surrounding him with his knowledge or opportunities of knowledge thereof to protect himself from being run against or struck by said traveller and injured."

This instruction also leaves out of view the evidence tending to show that the said danger from the crane was open and obvious, as did instruction No. 1, so that what was said in discussing that instruction is applicable to No. 2, and need not be repeated.

The witnesses relied on to establish the custom upon which the instruction is based are Griggs, Mays, Brown, Williams, the plaintiff and his mother. Griggs and Mays were "hangers on" or "floormen" in the boiler shop where there was a custom, but the conditions were very different, and they stated nothing as to any such custom in the "shovel shop." Brown who worked in the shovel shop proved that there was such a custom as to employees working within the tracks of the crane, but that there was no such custom as to those working outside of the tracks. The plaintiff's mother knew nothing about the alleged custom—except what she had heard one of the defendants' witnesses say before the trial. Her statement was admissible to impeach that witness' credibility, but was evidence for no other purpose. *Charlton v. Unis*, 4 Gratt. 58. Williams and the plaintiff

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proved that they had been told by the operators of the cranes the day before the accident, when they were on or so near the track as to be in danger, to get out of the way. The fact that the operator who happened to see their peril called their attention to it does not prove that it was his duty to keep a lookout for them, since his duties required him, as is shown, to watch the crane load so as to prevent injuring anyone on the floor below, or that there was a custom that they should be warned of the approach of the crane. Seeing their danger, it would have been negligence not to have warned them of it. But that evidence, in the face of the positive and uncontradicted evidence of the defendants' witnesses, that there was no such custom, hardly tends to prove, much less proves, the custom. Since the abolition of the *scintilla* doctrine, an instruction ought not to be given when the evidence upon which it is based is clearly insufficient to sustain a verdict.

The action of the court in refusing to give instructions Nos. 6 and 7, asked for by the defendants, is assigned as error.

The phase of the case intended to be covered by instruction No. 6 was fully and fairly submitted to the jury by the defendants' instruction No. 5 and the court's instruction "A."

The principle of law stated in instruction No. 7 is sufficiently covered by instruction No. 4 given for the defendants.

The court, therefore, did not err in refusing to give instructions Nos. 6 and 7.

As the judgment will have to be reversed for reasons hereinbefore stated, it is unnecessary and could serve no useful purpose to consider the remaining assignment of error, that the verdict of the jury is contrary to the evidence, as the evidence may not be the same upon the next trial.

The judgment will be reversed, the verdict of the jury set aside and the cause remanded for a new trial to be had, not in conflict with the views expressed in this opinion.

*Reversed.*

## Statement.

**Richmond.**

## BOARD OF TRADE BUILDING CORPORATION v. CRALLE.

March 11, 1909.

1. MASTER AND SERVANT—*Who is Not a Servant—Employment by a Servant—Passenger Elevators.*—The owner of a passenger elevator is not responsible for an injury inflicted on a passenger by the negligence of an operator not employed, directly or indirectly, by the owner, but who was merely requested to operate the elevator for that trip by an "office boy" of the owner who had no power or authority, express or implied, to employ a servant for the owner. A master is liable for an injury inflicted on a third person by the acts or omissions of his servants while acting within the scope of their employment and in furtherance of it, but he is not liable as master where he does not occupy the relation of employer to the person whose negligence occasioned the injury.
2. MASTER AND SERVANT—*Employment by Servant—Assistants—Authority—Negligence.*—A master is liable for the negligence of a person employed by his servant in the prosecution of the master's business, or of a person who assists his servant at his request, provided the servant had express or implied authority to procure assistance, and the negligent act complained of was done within the scope of the employment.
3. CARRIERS—*Injury to Passengers—Proximate Cause—Leaving Elevator Door Open—Operation by Stranger.*—Leaving an elevator door open while the "elevator boy" is temporarily absent in another part of the building is not the proximate cause of an injury inflicted on a passenger by the negligence of a stranger who undertakes to operate the elevator, nor was such an injury reasonably to have been anticipated by the owners of the elevator.

Error to a judgment of the Law and Chancery Court of the

## Opinion.

city of Norfolk in an action of trespass on the case. Judgment for the plaintiff. Defendant assigns error.

*Reversed.*

The opinion states the case.

*Cabell & Cabell* and *Hughes & Little*, for the plaintiff in error.

*R. H. Bagby*, *R. C. Marshall* and *Thorp & Bowden*, for the defendant in error.

BUCHANAN, J., delivered the opinion of the court.

This is an action to recover damages for personal injuries suffered by the defendant in error whilst on a passenger elevator of the plaintiff in error. There was a verdict and judgment against the defendant in the trial court, and to that judgment this writ of error was awarded upon its petition.

The evidence, so far as it is material to the questions involved in this court, shows that the defendant company was the owner of a seven story office building in the city of Norfolk, in which it operated two passenger elevators. On the seventh floor of the building are the rooms of the Board of Trade and Business Men's Association of the city of Norfolk, of which the plaintiff was a member. On a Sunday morning in May, 1907, the plaintiff, between eight and nine o'clock, entered the hall or lobby of the defendant's building for the purpose of going up to the rooms of the Board of Trade. On entering, he found one of the elevators at that floor with the door open but no elevator boy in sight. At the bottom of the elevator well, under the other elevator, was an employee of the defendant, named Zachary, engaged in oiling its machinery. He was the "hall boy" of the building, but it was a part of his duty to assist the elevator boys in oiling the elevator machinery every Sunday

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morning. The plaintiff, not seeing an elevator boy, enquired of Zachary where he was. In reply (both of the elevator boys being in the building, one getting oil on that floor, and the other on the fourth floor changing his clothes, as Zachary testified) he told a boy standing in the lobby to take the plaintiff up in the elevator. This the boy did, and as the plaintiff was stepping out of it at his point of destination, the boy started the elevator down at a very rapid speed, carrying the plaintiff with it, and causing the injuries complained of. The boy was not an employee of the defendant, but had come into the building to borrow a chair to take across the street to a barber shop where he worked.

The plaintiff testified that he did not know that the boy was not connected with the elevator, but presumed that he was a regular elevator boy; that he did not know them as they were frequently changed.

Zachary testified that he instructed the boy how to manage the elevator when he asked him to take the plaintiff up, but the plaintiff denies that he heard it. The evidence is also conflicting as to whether the elevator boys always wore uniforms when on duty. The plaintiff, who was frequently carried on the elevator, says that the boy in question did not have on a uniform, and that the elevator boys did not always wear them.

It further appeared that no one was authorized to employ elevator boys except the machinist and engineer in charge of the building, and that the elevator boys were the only persons who had any right to run the elevators, though Zachary testified that he did occasionally, for a few moments at a time, operate them when the elevator boys were not in place. There was evidence tending to show that one of the elevator boys had been in the service of the defendant as such for about a year, and the other for seven or eight months.

The declaration charged several acts of negligence on the part of the defendant, but the material question involved here

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is whether or not the defendant is responsible for the act of the boy operating the elevator at the time the plaintiff was injured, as its employee or otherwise. This question was raised by the plaintiff's instruction No. 1, which was given, and by the instruction copied in bill of exceptions No. 2, asked for by the defendant and refused by the court. Those instructions are as follows:

"1. If the jury shall believe from the evidence that the plaintiff found the door of said defendant's elevator in said premises open between the hours of 7 A. M. and 2 A. M. on the day of the accident he had the right to take passage upon said elevator to be transferred to the seventh floor of said premises, and, if he did so, it became and was the duty of the defendant to provide a competent operator to run said elevator. And if the jury shall believe from the evidence that the plaintiff did find said elevator open between the hours aforesaid and did take passage thereon as aforesaid and that the defendant negligently allowed a boy who was not a competent operator and not in defendant's employment, to take charge of said elevator and operate the same, and the plaintiff was injured as charged in the declaration by reason of the unskilful operation of said elevator by said boy, then they shall find for the plaintiff, unless they shall further believe from the evidence that the plaintiff at the time he so became a passenger upon said elevator knew, or by the exercise of ordinary care ought to have known, that said boy was incompetent, or not in the employment of said defendant for the purpose of operating elevators."

(DEFENDANT'S INSTRUCTION.)

"Even if the jury believe from the evidence that the plaintiff was injured while a passenger upon the elevator of the defendant, and that such injury was caused by the negligence of the person operating it, if they also believe that such person



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was directed to operate it by Oscar Zachary, without the knowledge or means of knowledge, or consent, or authority of the defendant, they will find for the defendant."

While it is well settled that a master is liable for the acts or omissions of his employees which result in injuries to third persons, when the act or omission of the employee was within the scope of his employment and in the line of his duty while engaged in such employment, it is equally well settled that neither the principle upon which that rule is based ("*qui facit per alium facit per se*"), nor the rule itself, can apply to a case where the party sought to be charged does not stand in the character of employer to the party by whose negligence the injury was occasioned. See *Muse v. Stern*, 82 Va. 33, 40-2, 3 Am. St. Rep. 77; *Ricci v. Mueller*, 41 Mich. 214, 2 N. W. 23; *McKinzie v. McLeod*, 10 Bing. 385; *Mangan v. Foley*, 33 Mo. App. 250; *King v. N. Y. C. & H. R. R. Co.*, 66 N. Y. 181, 184, 23 Am. Rep. 37; *McGuire v. Grant*, 25 N. J. Law, 356, 67 Am. Doc. 49.

It also seems to be settled that the master is liable for the negligence of a person employed by his servant in the prosecution of the master's business, or of a person who assists his servant at his request, provided the servant had express or implied authority to procure assistance, and the negligent act complained of was done within the scope of the employment. See 26 Cyc. 1521; *Quarman v. Burnett, &c.*, 4 Jurist, 969; *Haluptzok v. Great Northern, &c. R. Co.*, 55 Minn. 446, 57 N. W. 144, 26 L. R. A. 739.

The uncontradicted evidence shows that Zachary, the "hall boy," had no express authority to employ anyone to operate the elevators. It being no part of his duty to operate them or to see that they were operated, it would seem clear that he had no implied power to employ another to do work he was not employed to do, and for the doing of which he was in no way responsible.

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In the case of *Taylor v. Baltimore & Ohio R. Co.*, 108 Va. 817, 62 S.E. 798, 2 Va. App. 650, recently decided by this court, which involved the question of whether or not the railroad company was liable for injuries suffered by the plaintiff, who had been requested by the conductor in charge of a freight train of the railroad company to assist him in unloading freight as he was late and his men were out of place, it was held that the plaintiff was not entitled to recover, because the conductor had no authority to create the relation of master and servant between the railroad company and the plaintiff, as well as because he had no intention of creating such relation in requesting the plaintiff to assist him in his work. It was held in that case, quoting with approval 1 Elliott on Railroads, sec. 202, that while the conductor has no general authority to make contracts on the part of the company he "may in rare instances of necessity, when circumstances demand it, bind the company by such contracts as are clearly necessary to enable him to carry out his prescribed duties."

If a conductor in charge of a freight train has no implied authority to employ another to assist him in performing his duties when his train is behind time and a brakeman is out of place, *a fortiori*, Zachary, the "hall boy," who was not charged with the duty of operating the elevator or of seeing that it was operated, could not create the relation of master and servant between the defendant and the boy running it when the plaintiff was injured because the elevator boys were out of place and the plaintiff was being delayed.

Since the relation of master and servant did not exist between the boy running the elevator at the time of the accident and the defendant, it was not liable as master or employer for the injuries resulting to the plaintiff from the boy's incompetency or negligence. If liable to the plaintiff at all, it must be because the defendant was guilty of negligence in leaving the elevator door open with no one in charge of it when the plaintiff

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came into the hall to be carried upon it, and that this negligence was the proximate cause of his injuries.

Conceding for the purposes of this case that the conditions which existed at that time were not merely a breach of the contract between the defendant and the Board of Trade by which the former had agreed to keep in operation a sufficient number of elevators, not exceeding two, to maintain prompt service, but was actionable negligence, was that negligence the proximate cause of the injury?

In the case of *Connell, &c. v. C. & O. Ry. Co.*, 93 Va. 44, 59-60, 24 S. E. 467, 32 L. R. A. 792, 57 Am. St. Rep. 786. it was held, quoting the language of Justice Miller, in *Scheffer v. R. R. Co.*, 105 U. S. 249, 26 L. Ed. 1070, that "to warrant a finding that negligence or an act not amounting to a wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances." *Winfree v. Jones*, 104 Va. 39, 44, 51 S. E. 153, 1 L. R. A. (N. S.) 201, and cases cited.

It was said in the last cited case, that "a natural consequence is one which has followed from the original act complained of in the usual, ordinary and experienced course of events. A result, therefore, which might reasonably have been anticipated or expected."

In *Foulkes v. Southern Ry. Co.*, 96 Va. 742, 32 S. E. 464, it was said: "It is not only requisite that damage, actual or inferential, should be suffered, but this damage must be the legitimate consequence of the thing amiss. The maxim of the law here applicable is that in law the immediate and not the remote cause of any event is regarded. \* \* \* If injury has resulted in consequence of a certain wrongful act or omission, but only through or by means of some intervening cause, from which last cause the injury followed as a direct and immediate

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Opinion.

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consequence, the law will refer the damage to the last or proximate cause, and refuse to trace it to that which was more remote."

Applying these principles to the facts of this case, it seems clear that the condition in which the elevator was when the plaintiff entered the defendant's building to become a passenger upon the elevator was not the proximate cause of the plaintiff's injury. It cannot be said that the natural and probable consequence of leaving the elevator door open while the boy in charge of it was temporarily absent in the building, getting oil or putting on his uniform, would be that a stranger, either as a volunteer or at the request of one of the defendant's employees, without express or implied authority, would undertake to operate the elevator and by his incompetency or negligence injure a person who, during the elevator boy's absence, might come into the building to be carried on the elevator. Neither can it be said that the defendant ought reasonably to have foreseen that such an injury, or any injury, might probably result from leaving the elevator in the condition in which it was, in the light of attending circumstances.

It follows from what has been said, that the court is of opinion that the trial court erred in giving the plaintiff's instruction No. 1, and in refusing to give the defendant's rejected instruction, and that for those errors its judgment must be reversed.

Having reached this conclusion, it is unnecessary to consider the remaining assignment of error, that the court erred in refusing to set aside the verdict of the jury.

The judgment will be reversed, the verdict set aside, and the cause remanded for a new trial, to be had not in conflict with the views expressed in this opinion.

*Reversed.*

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Syllabus.

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**Richmond.**

## BOWE v. CITY OF RICHMOND.

March 11, 1909.

1. **TAX DEEDS—*Purchaser from State—Prepayment of City and State Taxes.***—Where land in the city of Richmond has been sold for city taxes and bid in by the city, but it has not perfected its title thereto, and the same land is subsequently sold for State taxes and knocked out to the auditor of public accounts, the charter of the city and the provision of chapter 28 of the Code are to be considered together and made to harmonize as far as possible in determining the rights of an applicant to purchase from the State, and the liability of the land for unpaid city taxes. So considering them, it is clear that the applicant has no right to purchase without paying the taxes due on the land to the city as well as those due the State.
2. **TAX DEED—*Premature Purchase—Invalidity of Deed.***—A deed from a clerk conveying land purchased by the State for delinquent taxes to an applicant under section 666 of the Code, as amended, which appears to have been made within less than four months after service of notice of the application to purchase is invalid on its face.
3. **TAX DEED—*Statute of Limitations—Compliance with Sections 661 and 666 of Code.***—In order to claim the benefit of the limitation of time within which a tax deed may be assailed and other provisions of section 661 of the Code, relating to the purchase of lands delinquent for taxes, a purchaser under section 666 of the Code must comply with all the provisions of the latter section.
4. **TAX DEED—*Failure to Comply with Law—Collateral Attack.***—A tax deed which shows on its face that the law which authorized its execution has not been complied with is invalid, unless there has been such a long acquiescence and possession under it as to justify a presumption in its favor, and may be collaterally assailed.

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Appeal from a decree of the Chancery Court of the city of Richmond. Decree for complainant. Defendant appeals.

*Affirmed.*

The opinion states the case.

*Stuart Bowe and Leake & Carter*, for the appellant.

*H. R. Pollard*, for the appellee.

BUCHANAN, J., delivered the opinion of the court.

From the year 1893 to the year 1899, inclusive, a lot lying in the city of Richmond, assessed in the name of Jane King, was returned delinquent for the non-payment of the city taxes or levies. Under the authority of the charter of the city, the lot was sold for each year's non-payment of the said taxes, and at each sale was bid in by the city, but the proceedings under its charter necessary to invest the city with title to the lot were not taken. Acts 1869-70, Ch. 101, sections 75 to 83.

In the year 1895, the said lot was returned delinquent for the non-payment of the taxes due the State, and in the year 1897 sold therefor and purchased by the State. No person entitled to redeem the land having done so within two years. R. B. Bowe, the appellant, on the 15th of November, 1899, filed his application with the clerk of the hustings court of the city to purchase the same under the provisions of section 666 of the Code of 1887, as amended by an act approved February 11, 1898 (Ch. 306, Acts 1897-8). The notice required by that section to be given was served on the 17th day of November, two days after the application to purchase was filed. On the 17th day of March, 1900, the clerk of the hustings court executed a deed to the appellant, conveying the lot to him as purchaser thereof. The deed was acknowledged and recorded on the same day.

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By section S3 of the city charter, as amended by an act approved March 6, 1900 (Ch. S64, Acts 1899-1900), it is provided, that where real estate has been struck off to the city—when sold by it for delinquent taxes or levies due it—which has not been redeemed, and to which the city has not perfected its title in the manner prescribed by its charter, the city may enforce its lien for the taxes due it in a court of equity, and release its right as purchaser, or to become a purchaser, of such real estate. Under that provision of its charter this suit was brought by the city, to subject the said lot to the payment of the taxes due the city, and for which it had been sold and bid in by the city. The appellant and the parties interested in the lot under the will of Mrs. Jane King, who had died in the year 1895, were made parties defendant to the suit.

The appellant demurred to and answered the bill. The court overruled the demurrer and directed one of its commissioners to ascertain and report the amount of taxes due the city, all the liens upon the lot, its annual and fee simple value, and who was the then owner thereof.

The commissioner reported that the amount of the city taxes (which was a little less than the amount claimed in the bill) was a lien upon the lot; that there were certain debts secured by deeds of trust which were also liens upon it; that the deed executed by the clerk of the hustings court to the appellant conferred no title upon him; and that the lot passed under the will of Mrs. King to John King, trustee for Mary M. J. K. Haynes and Maggie A. K. Dicken.

Each of the findings of the commissioner were excepted to by the appellant. The exceptions were overruled by the court, the report confirmed, and a decree entered setting aside and annulling the deed executed by the clerk of the hustings court to the appellant as to the taxes due the city, and directing the lot to be rented for the satisfaction of the same.

From that decree this appeal was allowed.

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The first question to be considered is whether or not the trial court erred in holding that the tax deed conveying the lot to the appellant was invalid as to the taxes due the city.

Section 666 of the Code of 1887, as amended by the act of February 11, 1898, under which the appellant filed his application to purchase, provided that if no person who had the right to redeem at the time of the service of the notice of the application to purchase shall appear within four months after such notice is served and redeem the land in the manner prescribed by the section, then the applicant shall have the right to purchase the same within five days from the expiration of the four months as aforesaid, by paying all taxes, penalties, fees and costs.

The deed shows upon its face that when it was executed the clerk of the hustings court had no authority to make the conveyance, because four months had not elapsed since the service of the notice of the application to purchase. It further appears from the deed itself, that the applicant to purchase had not paid the taxes due the city; and that he had not is one of the admitted facts in the case.

While the provisions of the charter of the city, under which it made sale of and bid off the lot in question for the non-payment of the city taxes due thereon, and the provisions of the general law of the State governing the sale of land returned delinquent for the non-payment of taxes, as found in chapter 28 of the Code of 1887, as amended and in force when the said lot was sold and purchased by the State for the non-payment of taxes due on it, are incongruous and difficult to construe so as to give effect to all the provisions of the charter of the city and of the general law in force when the applicant filed his petition to purchase, it is clear, we think, that when the provisions of both are considered together and made to harmonize as far as possible, as they must be, they did not authorize a sale and conveyance of the lot to the appellant without his paying the taxes due thereon to the city as well as those due the State.



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There is language in section 666 of the Code, as amended by the act approved February 11, 1898, which, if it stood alone, would have given the appellant the right to purchase the lot "for the amount for which the sale to the Commonwealth was made;" but there is also language in the section which made his right to purchase dependent upon "his paying to the clerk all taxes, penalties, fees and costs" due on the lot and connected with his application to purchase. Which of these conflicting, or apparently conflicting, provisions is to control must be determined by looking to the other provisions of chapter 28 of the Code, and especially sections 636, 638, 642 and 662 of the Code.

Section 636 of the Code makes the taxes due the city as well as those due the State a lien upon the lot. Sections 638 and 639 provide for a sale of the lot for a sum sufficient to pay the unpaid State and city taxes thereon, with interest, costs and charges connected therewith. Section 662 provides, that "when any real estate is offered for sale, as provided by section 638, and no person bids the amount chargeable thereon, the treasurer shall purchase the same in the name of the auditor of public accounts, for the benefit of the State and county, city or town, respectively, unless such real estate has been previously purchased in the name of the auditor, in which case it shall be sold for such price as it will bring."

When all the provisions of law bearing upon the question, as before stated, are considered together, it is clear that the lot, when purchased in the name of the auditor of public accounts in 1897, was held for the benefit of the city as well as for the State, and that the appellant had no right to purchase it without the payment of the taxes thereon due both.

But it is insisted that, even if this be so, this suit was not instituted until more than two years after the recordation of the appellant's deed, and is therefore barred by section 661 of

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the Code, which provides, among other things, that a suit to set aside, annul and cancel the deed of a purchaser under the provisions of section 666 of the Code shall not be brought except for fraud, unless it be brought within two years after the deed has been duly admitted to record.

In order to claim the benefit of the provisions of section 661, as was held in *Virginia Building & Loan Co. v. Glenn and others*, 99 Va. 460, 39 S. E. 136, a purchaser under section 666 of the Code must comply with all the provisions of the latter section. This, as we have seen, the appellant did not do.

It is further insisted that this suit is a collateral attack upon the appellant's deed, and cannot, therefore, be maintained under the decisions of this court in the cases of *Hitchcock v. Rawson*, 14 Gratt. 526, and *Machir v. Funk*, 90 Va. 284, 18 S. E. 197.

It was held in the first named case that the tax deed offered in evidence in an action of ejectment could not be collaterally attacked for irregularities upon its face. The deed in that case was made under and confirmed by decrees of a court having jurisdiction of the proceedings in which the deed was made. In disposing of the question of the irregularities in the proceeding, Judge Lee, speaking for the court, said: "It is not a question of jurisdiction, but of the regularity of the mode in which the jurisdiction has been exercised; and if there be jurisdiction, whatever irregularities may have occurred in the course of the proceeding, the decree will yet be evidence, at least as against strangers, in a subsequent collateral proceeding. That mere irregularities in a case of this kind will not suffice to exclude the record as evidence in a subsequent controversy, when offered by the party claiming under the sale, has been expressly decided by this court in *Smith v. Chapman*, 10 Gratt. 445, and it cannot be considered as any longer an open question."

In *Machir v. Funk*, the other case relied on, it was held, upon the authority of *Hitchcock v. Rawson*, that the validity of a

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sale of land delinquent for the non-payment of taxes, which is regular on its face, cannot be collaterally assailed.

This is a different case from either of those. The deed in this case is invalid on its face. The clerk of the hustings court had no authority to make a deed to the applicant until the four months had expired after the service of the notice required by section 666 of the Code. He was clothed with a mere naked power and could only exercise it in the manner prescribed by law.

Such a deed is invalid, unless there has been such a long acquiescence and possession under it as to justify a presumption in favor of the deed, as was the case in *Robinett v. Preston's Heirs*, 4 Gratt. 141. See *Sulphur Mines v. Thompson's Heirs*, 93 Va. 316, 25 S. E. 232, and authorities cited.

That a tax deed which shows upon its face that the law which authorized its execution has not been complied with is invalid, see also *Redfield v. Parks*, 136 U. S. 239, 250, 33 L. Ed. 327, 10 Sup. Ct. 83; *Swipe v. Prior*, 58 Iowa, 412, 10 N. W. 788; *Bowman v. Wittig*, 39 Ill. 416, 428; Black on Tax Titles, sec. 208.

We are of opinion that the chancery court did not err in holding that the tax deed of the appellant was invalid as to the claim asserted by the city of Richmond against the lot in question, and in directing it to be subjected to the payment of the taxes ascertained to be due the city.

There being no error in the decrees appealed from to the prejudice of the appellant, they must be affirmed.

*Affirmed.*

Syllabus.

**Richmond.**

**BIBB AND OTHERS V. AMERICAN COAL AND IRON CO. AND  
OTHERS.**

March 11, 1909.

Absent, Keith, P., and Cardwell, J.

**1. REFORMATION OF INSTRUMENTS—*Mutual Mistake—Proof Required.*—**

The burden of proof is on the complainant, and a very high degree of proof is required, in a suit to reform a written contract. A mere preponderance of the evidence is not sufficient, but the existence of the mutual mistake must be conclusively established.

**2. EQUITY—*Supplemental Bills—Office of.*—**One of the chief offices of

a supplemental bill is to bring into the case new events referring to and supporting, or affecting, rights and interests already mentioned, which have arisen subsequently to the filing of the original bill.

**3. VENDOR AND PURCHASER—*Damages—Defective Title to Gas Well—***

*Lease—Well Ceasing to Flow Pending Suit for Purchase Price—*

*Supplemental Bill.*—In a suit to enforce the collection of the balance of purchase money for real property, a part of which consisted of a gas well, where it appears that the property was sold in fee, free from encumbrances, at a gross price, and that the complainant did not have title to the gas well, and in consequence thereof the defendant was compelled to lease the gas well, the fact that the well ceased to flow and was abandoned pending the suit may be set up by a supplemental bill, and the complainant is entitled to recover the balance of purchase money less such reasonable sums as were paid for the use of the gas well while it flowed. In the absence of fraud, where the outstanding title is acquired, or an incumbrance is removed, by purchase by a vendee in possession, such vendee is entitled to the amount reasonably and fairly paid by him on that account, and to no more.

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Appeal from a decree of the Chancery Court of the city of Richmond. Decree for defendants. Complainants appeal.

*Reversed*

The opinion states the case.

*Scott, Buchanan & Cardwell*, for the appellants.

*H. R. Pollard, H. A. McCarthy and Meredith & Cocke*, for the appellees.

WHITTLE, J., delivered the opinion of the court.

The original bill in this case was filed by the appellants against the appellees in September, 1902, to enforce the payment of \$5,000, the residue of the purchase price of \$35,000, for the sale of their lease-hold interest in a tract of coal land located in Mingo county, West Virginia, together with the improvements, fixtures and certain personal property, consisting of a stock of goods, live stock and unexpired insurance policies, and also "the natural gas well" on the premises, under a contract of December 10, 1901. The contract stipulates that the foregoing property is to be conveyed by deed free from incumbrances.

The bill contests the title of the Mingo Coal Company to the gas well, or, at least, the right of that company to exact compensation for its use, either from the plaintiffs or their assignee, the American Coal and Iron Company. The plaintiffs also assert title in themselves to the property, at least to the extent of their right to use it in connection with their leasehold free of rent. It is, moreover, alleged that it was the intention of the plaintiffs, by the contract of sale, to sell, and of the American Coal and Iron Company to buy, only such interest in the gas well as they acquired from their grantors, Morrison and

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Walker, and that the insertion of the provision in respect to that property in the fee simple clause of the contract of sale was the result of a mutual mistake; and the prayer of the bill is that the contract be reformed so as to conform to the true understanding of the parties. The answers of the defendants controvert both contentions.

The American Coal and Iron Company, in its answer, says that, shortly after the contract of purchase had been executed, it first learned of the claim of the Mingo Coal Company to the gas well; and that, in order to avoid complications and to continue its mining operations, it was compelled to enter into an agreement with the Mingo Coal Company, by which it was allowed to use the gas from the well upon the payment of an annual charge of \$250; that it had paid all the purchase money due under the contract of December 10, 1901, except \$5,000, which sum it notified the plaintiffs it would hold to indemnify and save itself and its assignee harmless on account of the failure of the plaintiffs to comply with their contract in the matter of conveying the gas well; "that it had repeatedly stated to the plaintiffs that it was ready to pay the residue of the purchase money if they would convey the gas well free of incumbrance, and relieve it and the assignee of the annual charge aforesaid."

The correspondence between the defendant and the plaintiffs in relation to the agreement for the use of the gas well shows that the annual stipend of \$250 covered the entire output of the well and the use of the gas for all purposes whatsoever. In a letter, under date of February 8, 1902, the president of the American Coal and Iron Company writes: "We are not raising a frivolous question. It is one of great importance to us. It involves our right to use the gas well free of charge and as our own, and the right of the Mingo Coal Company to demand a compensation of us for the use of the well during the life of our lease." A few days later he says: "In a word, the lease to us

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from the Mingo Coal Company gives us no greater right than we would have enjoyed if your sale of the well to us had carried with it a good title."

The vendee was never deprived of the possession or use of the well, and all the gas was consumed by it in the use and ceased to flow, and the well was abandoned as valueless August 21, 1904.

Before the hearing, the plaintiffs asked leave to file a supplemental bill, which alleged that the vendee took possession of all the property included in the contract of sale, and in connection with its mining operations used the gas from the well until it ceased to flow and the well was abandoned August 21, 1904. But leave to file the supplemental bill was denied, the court being of opinion that even if its allegations were proved the plaintiffs would not be entitled to the abatement of damages prayed for. The court also decreed that the American Coal and Iron Company was entitled to retain the \$5,000, the balance of the purchase price of the property sold under the contract of December 10, 1901, as compensation for the failure of the plaintiffs to convey to it a good title to the gas well free from all incumbrances, and dismissed the plaintiffs' bill with costs. From that decree this appeal was allowed.

We find no error in the ruling of the chancery court upon the primary contentions of the plaintiffs, in regard to their title to the gas well, and the alleged mutual mistake in the contract of sale. The burden of proof rested on the plaintiffs in both instances, and, without reviewing the testimony on those issues, we are of opinion that on neither point has it been satisfactorily borne.

The law is well settled, that a very high degree of proof is required in a suit to reform a written contract. The mere preponderance of evidence is not sufficient, but the existence of the mutual mistake must be conclusively established.

In *Pomeroy on Specific Performance* (ed. 1897), sec. 261.

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the rule is thus stated: "The defect in the contract must, however, be proved beyond all reasonable doubt, by evidence of the clearest and most satisfactory nature. The burden of proof is on the plaintiff. \* \* \* An alteration of the writing cannot be made upon a conjecture as to the true reading, even though the court is satisfied that the existing instrument does not express the real intention of the parties."

The decisions of this court are in full accord with that statement of the law as to the character of evidence necessary to reform a written contract. *Mauzy v. Sellars*, 26 Gratt. 641, 647; *Carter v. McArter*, 28 Gratt. 356, 360; *Fudge v. Payne*, 86 Va. 303, 10 S. E. 7; *S. V. R. Co. v. Dunlop*, 86 Va. 346, 351, 10 S. E. 239; *Donaldson v. Levine*, 93 Va. 472, 25 S. E. 541; *Moore v. Assurance Co.*, 103 Va. 391, 394, 49 S. E. 499; *Beach v. Bellwood*, 104 Va. 170, 183, 51 S. E. 184.

Putting aside, therefore, both of these contentions as not proved, we shall address ourselves to the ruling of the trial court on the question of the measure of damages to which the vendee is entitled on account of the defective title of the plaintiffs to the gas well.

In approaching the consideration of that question, we may premise that the record does not show either fraud or misrepresentation on the part of the plaintiffs with respect to their title to the gas well. The acquiescence of the Mingo Coal Company in the use of the well as an incident to the leasehold of the coal property in the past may well have induced belief on the part of the plaintiffs that it would make no charge for the continued use of it by their vendee.

As a question of correct practice, under the evidence in the case, we have no doubt about the propriety of bringing into the record the fact of the exhaustion and abandonment of the gas well by the vendee pending litigation, as affecting the measure of its damages. Even in an action at law on a life insurance policy which had been repudiated by the insurance company,



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where the insured died before trial, the beneficiary was permitted to prove the cessation of the life of the insured as an element proper to be considered in fixing the *quantum* of damages. Opinion by Burks, Jr., in *Clemmitt and wife v. New York L. Ins. Co.*, 76 Va. 355, 362.

One of the chief offices of a supplemental bill is to bring into the case new events referring to, and supporting, or affecting rights and interests already mentioned, which have arisen subsequently to the filing of the original bill. Story's Eq. Pl., sec. 336; 1 Bar. Chy. Pr. 165, 351; *Pleasant v. Logan*, 4 H. & M. 489; *Boykins v. Smith*, 3 Munf. 102; *Laidly v. Merifield*, 7 Leigh, 346; *Glenn v. Brown*, 99 Va. 322, 38 S. E. 189.

Though it is undoubtedly true, as a general proposition, that the test of the value of property sold is to be applied as of the day of sale, the case in judgment does not come within the influence of that principle. In other words, we are not called on here to speculate as to the value of the gas well (the price of which was not fixed by the parties in the contract of sale, and as to which there is no evidence in the record), as an original proposition; but our inquiry is limited to the ascertainment of the *quantum* of damages sustained by the vendee by reason of the failure of the vendors to convey a good title to the property in controversy.

The well established rule on that subject is that, in the absence of fraud, where the outstanding title is acquired or the incumbrance removed by the vendee in possession by purchase, such vendee is entitled to the amount reasonably and fairly paid by him on that account, and to no more. That principle is distinctly enunciated by the Supreme Court of the United States in the case of *Bush v. Marshall*, 6 How. 284, 12 L. Ed. 440. Mr. Justice Grier, in delivering the opinion of the court, quotes with approval the statement of the law from the case of *Galloway v. Findlay*, 12 Pet. 295, 9 L. Ed. 1079, as follows: "Equity treats the purchaser as a trustee for his vendor, because

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he holds under him; and acts done to perfect the title of the former, when in possession of the land, inure to the benefit of him under whom the possession was obtained, and through whom a knowledge of a defect of title was obtained. The vendor and vendee stand in the relation of landlord and tenant; the vendee cannot disavow the vendor's title."

These principles are universally recognized, and firmly established in Virginia. *Hill v. Cunningham*, 1 Munf. 332, 338; *Bryan v. Salyards*, 3 Gratt. 181; *Roller v. Effinger*, 88 Va. 645, 14 S. E. 337; *Burnett v. Cardwell*, 76 U. S. 290, 19 L. Ed. 712; *Peters v. Bowman*, 97 U. S. 56, 25 L. Ed. 91; Rawle on Cov. for Title (5th ed.), sec. 192; Wood's Mayne on Dam., sec. 250.

Nor is the application of the rule to this case affected by the circumstance that the American Coal and Iron Company only acquired the use of the gas well. It was dealing in regard to a species of property of uncertain duration, and prudently adopted a form of contract which rendered the benefits and burdens reciprocal and co-existent, the plan being to set apart a sum of money, the interest on which, at 5%, would yield a sum equal to the annual exaction for the use of the well as long as the gas might continue to flow. That mode of adjustment was chosen by the vendee without consulting the plaintiffs, and the wisdom of it has been demonstrated by subsequent events. The fact that it was satisfactory to the vendee and considered the equivalent of a conveyance by the plaintiffs of the gas well, clearly appears not only from the conduct of the parties, but also from the answer and the extract from the letter of the president already quoted.

Subordinating, then, form to substance, our conclusion on this branch of the case is that the American Coal and Iron Company (after having been placed in possession of the gas well by its vendors under the contract of sale) acquired the outstanding title of the Mingo Coal Company to the gas well, and

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is affected with an equity in favor of its vendors which forbids that it shall demand of them more than its actual outlay in the purchase of such title.

It follows from these views that the decree of the chancery court must be reversed; and this court will enter such decree as that court ought to have entered, awarding to the appellants the balance of their purchase money, with interest, subject to a credit for the amount paid by the American Coal and Iron Company to the Mingo Coal Company for the use of the gas well.

*Reversed.*

Statement.

**Richmond.**

BELMONT IRON WORKS v. HOTEL CORPORATION OF NORFOLK.

March 11, 1909.

Absent, Keith, P.

1. BUILDING CONTRACTS—*Damages for Breach—Architect's Certificate—Condition Precedent—Cross Bill.*—Where a contract for building materials requires the certification by the architects of the refusal, neglect or failure of the contractor to furnish materials, and that any damage resulting from such default shall be audited and certified by the architects, whose certificate shall be conclusive upon the parties, there can be no recovery of such damages unless such certificate is produced, or good reason is shown why it is not. Obtaining the certificate is a condition precedent to the institution or maintenance of legal proceedings to recover damages for the breach of the contract. The same rule applies to the assertion of such a claim by a cross-bill filed in a suit to enforce a mechanics' lien for materials furnished.

Appeal from a decree of the Court of Law and Chancery of the city of Norfolk. Decree for defendant. Complainant appeals.

*Reversed.*

The opinion states the case.

*Riddleberger & Roper*, for the appellant.

*Thos. H. Willcox*, for the appellee.

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WHITTLE, J., delivered the opinion of the court.

The essential allegations of the appellant's bill are that on June 2, 1905, it entered into a written contract with the appellee whereby, as a general contractor, it agreed to supply the structural steel to be used by the Hotel Corporation in the erection of a hotel building on its lot in the city of Norfolk; that the appellee is indebted to the appellant in the sum of \$3,415.38, with interest from December 15, 1905, for the last installment of steel furnished under the agreement, for which sum it has perfected a mechanic's lien under the statute upon the property of the defendant, which it prays may be enforced.

By answer and cross-bill the defendant admits the contract, but denies that the plaintiff has complied with its terms. On the contrary, the defendant avers that the plaintiff failed to deliver the materials at the dates specified in the contract, in consequence of which the completion of the building was delayed for the period of eighty days; that such delay occasioned a loss to the defendant of \$4,004, which amount it asserts by way of setoff against the plaintiff's demand.

From a decree allowing the setoff to the extent of \$3,002.68. this appeal was granted.

The form of contract employed by the parties is the standard contract in common use with building contractors and supply men, and has repeatedly been interpreted by the courts. Without concerning ourselves about the minor questions raised in the case, we shall, therefore, consider the rights of the parties under Article V. of the contract, which covers the point at issue and reads as follows:

"Should the contractors at any time refuse or neglect to supply a sufficiency of properly skilled workmen, or of the materials of the proper quality, or fail in any respect to prosecute the work with promptness and diligence, or fail in the performance of any of the agreements herein contained, such re-

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refusal, neglect, or failure being certified by the architects, the owners shall be at liberty, after six (6) days' written notice to the contractors, to provide any such labor or materials, and to deduct the cost thereof from any money then due or thereafter to become due to the contractors under this contract; and if the architects shall certify that such refusal, neglect or failure is sufficient ground for such action, the owners shall also be at liberty to terminate the employment of the contractors for the said work, and to enter upon the premises and take possession, for the purpose of completing the work included under this contract, of all materials, tools and appliances thereon, and to employ any other person or persons to finish the work, and to provide the materials therefor; and, in case of such discontinuance of the employment of the contractors, they shall not be entitled to receive any further payment under this contract until the said work shall be wholly finished, at which time, if the unpaid balance of the amount to be paid under this contract shall exceed the expense incurred by the owners in finishing the work, such excess shall be paid by the owners to the contractors; but if such expense shall exceed such unpaid balance, the contractors shall pay the difference to the owners. The expense incurred by the owners, as herein provided, either for furnishing materials or for finishing the work, and any damage incurred through such default, shall be audited and certified by the architects, whose certificate thereof shall be conclusive upon the parties."

The stipulation in the foregoing article, requiring certification by the architects of the refusal, neglect or failure of the contractor to furnish materials; and providing that any damage resulting from such default shall be audited and certified by the architects, whose certificate thereof shall be conclusive upon the parties, constitutes a condition precedent to the institution and maintenance of legal proceedings to recover damages for the alleged breach of contract set out in the cross-bill. Such has

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been the uniform construction placed by the courts upon building contracts for work done and materials furnished, embodying the identical language of Article V.

Thus, in *International Cement Co. v. Beifeld*, 173 Ill. 179, 50 N. E. 716, the court held, that "where a building contract provides that upon a certificate by the architect of the contractor's default the other party may complete the contract, and that the expenses thus incurred shall be audited and certified by the architect, whose certificate shall be conclusive, a claim by the other party for completing the contract cannot be allowed \* \* \* without the production of the architect's certificate."

So also, in *American Bonding & Trust Co. v. Gibson County* (C. C. A.), 127 Fed. 671, the circuit court of appeals for the sixth circuit held, that "under the contract, the county had a right to insist on a certificate from the architects before paying the contractors for the work done."

In *Scott v. Texas Construction Co.* (Court of Civil Appeals of Texas), 55 S. W. 37, it was held, that "where a contract under which damages were claimed provided that no damages should be awarded unless certified by the superintending architect, damages cannot be awarded unless such certificate be produced, or good reason shown why it could not be had."

In *O'Keefe v. Corporation of St. Francis Church*, 59 Conn. 551, 22 Atl. 325, the Supreme Court of Errors of Connecticut held that "the owner could not charge the contractor with the cost of completing the work, since the provision of the contract requiring the architect to certify the contractor's failure was not complied with."

To the same effect is the case of *De Mattos v. Jordan*, 20 Wash. 315, 55 Pac. 118.

These authorities are in entire harmony with analogous decisions of this court, upholding and giving full effect to stipulations in contracts for the construction of railroads, which pro-

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vide that the estimates and certificates of the company's engineer as to the work done and amount due shall be conclusive upon the parties in the absence of fraud. *Condon v. Southside R. R. Co.*, 14 Gratt. 302; *B. & O. R. Co. v. Polly, Woods & Co.*, 14 Gratt. 447; *James River & Kanawha Co. v. Adams*, 17 Gratt. 427, 441; *Mills & Fairfax v. N. & W. Ry. Co.*, 90 Va. 523, 19 S. E. 171; *Norfolk & W. R. Co. v. Mills*, 91 Va. 613, 22 S. E. 556.

It is not pretended that the conditions contained in Article V. have been complied with in this instance, nor is any excuse offered for the omission to do so. True, the contention is made that the cross-bill is not a suit on the contract, but a suit outside of the contract to recover damages for delay in the delivery of materials. A similar contention was made in several of the cases cited without avail, and the most casual inspection of the cross-bill will show that the pretension is wholly groundless.

Without pursuing the discussion of the principal proposition further, we are of opinion that the trial court erred in not holding that obtaining the certificate of the architects, as required by Article V. of the contract, was a condition precedent to the right of the defendant to have allowed the damages asserted in its cross-bill.

For that error, the decree must be reversed, and this court will proceed to enter such decree as the Court of Law and Chancery ought to have entered, disallowing the setoff, and dismissing the cross-bill with costs.

*Reversed.*



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Syllabus.

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**Richmond.**

## CITY OF RICHMOND v. BARRY.

March 11, 1909.

1. DEMURRER TO EVIDENCE—*Concessions of Demurrant*.—On a demurrer to the evidence, the party demurring is considered as admitting the truth of his adversary's evidence, and all just inferences that can be properly drawn therefrom by a jury, and as waiving all of his own evidence which conflicts with that of his adversary, and all inferences from his own evidence which do not necessarily result therefrom. Moreover, if the evidence is such that the jury might have found a verdict for the demurree, the court must grant judgment in his favor.
2. CONTRACTS—*Construction*.—Under a contract providing that a contractor shall furnish all materials of every description, and shall shore all trenches with sheet piles and braces to prevent any settlement, and that when necessary sheet piles and braces shall be left in the trenches to prevent settlement, lumber and timber left in a sewer at the request of the city engineer constitute materials which, according to the contract, the contractor had to furnish and leave in the trenches.
3. CONTRACTS—*Construction—Ambiguity—Usage of Trade—Estimating Brick Wall*.—Where a contract for a brick sewer provides that the "price for bricks furnished and laid in the sewer shall be twenty dollars and fifty cents per M," in the absence of any local usage or custom which should control in ascertaining the number of bricks laid in the sewer, or of any special agreement, the parties are deemed to have contracted with reference to the general usage of trade, or universal custom relating to such matters: and, according to such trade usage or custom, the number of bricks is to be ascertained by measurement and allowing so many bricks to the cubic foot, and not by actual count. This trade usage or custom is read into the contract by operation of law, and becomes as much a part of the contract as if incorporated into it.

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4. **CONTRACTS—Awards—Engineer's Estimates—Usage of Trade.**—Although a contract with a city provides that the city engineer shall decide all questions, difficulties and disputes growing out of the contract, and that his estimates and decisions shall be final and conclusive upon the parties thereto, he cannot violate the provisions of the contract nor ignore the meaning attached by trade usage to words or expressions used in the contract, and which are made a part thereof by operation of law.
5. **EVIDENCE—Usage of Trade to Fix Meaning of Contract.**—Parol evidence of a general usage of trade or universal custom may be received to fix and determine the meaning of words of a contract affected by such trade or usage which would be otherwise ambiguous.
6. **APPEAL AND ERROR—Errors of Calculation—Correction.**—A manifest or admitted error in the amount of a judgment at law will be corrected by this court, without remanding the cause for such correction.

Error to a judgment of the Law and Equity Court of the city of Richmond in an action of assumpsit. Judgment for the plaintiff. Defendant assigns error.

*Amended and affirmed.*

The opinion states the case.

*H. R. Pollard and Geo. Wayne Anderson*, for the plaintiff in error.

*Meredith & Cocke*, for the defendant in error.

CARDWELL, J., delivered the opinion of the court.

This action of assumpsit, brought by Thomas A. Barry against the city of Richmond, grew out of the execution of certain work under four written contracts entered into by the city with Barry, for the construction of certain sewers and other incidental work in connection therewith, the plaintiff claiming an indebtedness to him from the city of \$7,924.73, on the following bill of particulars:

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"For timber furnished in penitentiary system of sewers, as per bill of particulars .....	\$2,269.05
Balance due on brick work on penitentiary system of sewers, as per bill of particulars .....	2,825.84
Balance on brick work and excavation on Church- hill avenue and Twenty-first street, as per bill of particulars .....	69.42
Balance due on brick work, excavation, laying pipes and sheeting in Orleans street sewers, as per bill of particulars .....	2,760.42
	<hr/>
	\$7,924.73"

It appears that the timber furnished in connection with the penitentiary sewers, for which the charge of \$2,269.05 was made, had been disallowed by the city engineer, and payment refused by the city, on the ground that under the contract and specifications made a part of the contract, the contractor was obliged "to furnish all materials, tools, labor, etc., except terra cotta pipe," in accordance with this provision in the specifications, viz.: "Excavations shall be done in the most careful manner, shoring all trenches with sheathing, piles and braces to prevent any settlement—where necessary sheathing, piles and braces shall be left in trenches to prevent settlement."

The other items claimed in the bill of particulars, with the exception of an item of \$88.32, grew out of a claim made by the plaintiff, that under a proper construction of the contracts and specifications for the doing of the work contracted for, the plaintiff was entitled to have bricks furnished by him paid for at the rate per thousand named in the contract, to be ascertained by *measurement* of the work, allowing so many bricks to the cubic foot; whereas, the city contended, and so made up and furnished to the contractor estimates from time to time as well as a final estimate, that the bricks furnished were to be ascer-

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tained by an actual count of the bricks in a square foot, and then by a lineal measurement of the work.

Upon the plea of *non assumpsit* interposed by the defendant city, accompanied by its grounds of defense in writing, a jury was impaneled, and after the evidence offered by both the plaintiff and the defendant had been submitted to the jury, the defendant city filed a written demurrer, with the specific grounds thereof in writing, to the evidence of the plaintiff, in which demurrer the plaintiff joined, and the jury were thereupon required to and did assess the plaintiff's damages to be the aggregate of the several sums stated in his bill of particulars, subject to the opinion of the court upon the demurrer to the evidence; whereupon, the court, at a later day, and after argument of counsel of the demurrer to the evidence, for reasons stated in a written opinion, made a part of the record, sustained the demurrer as to the item of \$2,269.05 for timber used in the construction of the "penitentiary sewers," but overruled the demurrer as to all the other items contained in the bill of particulars, and entered judgment, to which this writ of error was awarded, in favor of the plaintiff and against the defendant city for the sum of \$5,665.68, with interest as set forth in the judgment.

The plaintiff in error (defendant below) assigns as error the ruling of the lower court upon the demurrer to evidence in favor of the defendant in error; while the latter assigns as cross-error the ruling against him as to his claim for timber furnished for the penitentiary sewers and required to be left therein.

Upon an examination of the evidence in the record, and the questions of law presented thereby, we are satisfied that the statement of facts made by the court below in its written opinion is correct; that its judgment upon the demurrer to the evidence is right, and that the reasons for the decision it rendered are as clearly and forcibly expressed in the opinion

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made a part of the record as we could state them; therefore, we adopt that opinion as the opinion of this court, which is as follows:

"This case, after elaborate argument, comes before this court on a demurrer to the evidence interposed by the defendant, the city of Richmond, the jury finding for the plaintiff, Barry, for each of the several claims, upon the demurrer to the evidence, subject to the judgment of the court on the law of the case.

"As preliminary to and as a guide to the court in its decision, it is necessary to have before the court in passing upon a demurrer to the evidence, the rule as to the evidence, its truth, and inferences therefrom, as laid down and settled by our own Supreme Court of Appeals.

"The rule as laid down by Judge Keith, in the case of the *University of Virginia v. Snyder*, 100 Va. 577, 42 S. E. 341, is that 'by the demurrer to the evidence, the party demurring is considered as admitting the truth of his adversary's evidence, and all just inferences which can be properly drawn therefrom by a jury, and as waiving all of his own evidence which conflicts with that of his adversary, and all inferences from his own evidence which do not necessarily result therefrom'—citing *Johnston v. C. & O. Ry. Co.*, 91 Va. 171, 21 S. E. 238.

"There is another rule established by our own court, to the effect that 'where, upon a demurrer to the evidence, the evidence is such that a jury might have found a verdict for the demurree, the court must grant judgment in his favor.' *Citizens Bank v. Taylor*, 104 Va. 164, 51 S. E. 159.

"The court now proceeding to a discussion and decision of the case at bar, would say that the claim for lumber, in its opinion, stands upon a different footing from the other claims of plaintiff for which the jury gave verdict. In the court's opinion, under the contract itself, the plaintiff is barred of his right to recover.

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"The contract provides, 'that the said party of the first part agrees with the said party of the second part, for the consideration herein mentioned, and at his own proper cost and expense, to do all the work, and furnish all the materials, tools and labor necessary to carry out this agreement under the conditions hereinafter specified,' etc. I shall not quote further from the terms of the contract at this time—except to allude to the provision that the specifications are made a part of the contract, and call attention to the clause where it is agreed that the work to be done under this contract is as follows: *To furnish all materials of every description* and the necessary tools, labor and mechanics and build the following sewer—underscoring is the court's, because in my opinion when the above provisions are read in connection with the requirement in the specifications, 'excavations shall be done in the most careful manner, shoring all trenches with sheet piles and braces to prevent any settlement. Where necessary sheet piles and braces shall be left in the trenches to prevent settlement, the lumber and timber left in the sewer at the request of the city engineer constituted materials which, according to the contract, the contractor had to furnish and leave in trenches, and which constituted the consideration to be furnished by the contractor on his part for which he was to be compensated out of the money he was to receive for the building and construction of the sewers. In other words, this was covered completely by the contract, *'modus et conventio vincunt leges.'* Therefore, the court will give judgment for the defendant, the city of Richmond, on so much of the verdict rendered by the jury as to the claim for lumber, as is set out in the verdict.

"This brings us to the penitentiary sewer, as to which the jury found for plaintiff on the demurrer to the evidence, subject to the judgment of the court on the law.

"The contract for 1st penitentiary sewer reads, on page 6: Price for bricks furnished and laid in sewer twenty dollars

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and fifty cents (\$20.50) per M.' This is all that is said as to the account or method of payment.

"The question here presented, and which represents the matter in dispute between the plaintiff, the contractor, and the defendant, the city of Richmond, is whether the bricks furnished by the contractor are to be paid for by and ascertained by actual count or by measurement of the work and allowing so many bricks to the cubic foot.

"The case of *Richlands & Co. v. Hildebeitel*, 92 Va. 94, 22 S. E. 806, is so apposite, that I shall, at the risk of being tedious, quote at length from this case. Judge Riely, who delivered the opinion, says: 'The Richlands Flint Glass Company bargained with J. H. Hildebeitel, the appellee, to do the brick work of the glass factory it proposed to erect, and George McCall, who was then its vice-president, drew up a memorandum of the agreement which was signed by the appellee. The memorandum merely sets forth the various prices which were to be paid per thousand for laying the brick of the different parts of the factory. It does not specify any mode by which the quantity of brick laid was to be ascertained and settled for. It is wholly silent as to this matter. The difference between the parties as to the method by which the quantity of brick is to be ascertained constitutes the real controversy in this case. The appellant company claims that as the contract does not specify any particular mode, its proper construction is that they are to be ascertained by actual count, and that no evidence can be received to show otherwise, as to do so would be to violate the well settled rule that parol evidence cannot be received to vary or contradict a contract in writing. The appellee contends, on the other hand, that where a contract for laying brick does not specify any particular mode of ascertaining the quantity, it is to be ascertained by the custom of the locality, or the usage of trade, which, in this case, would be by measuring the work and allowing so many bricks to the

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cubic foot. If the quantity is ascertained by measurement, which includes the mortar joints and makes no allowance for small openings, and not by actual count, the quantity of brick thus ascertained is necessarily greater. 'Extrinsic evidence,' it is said in Browne on Parol Evidence, sec. 57, 'is admissible in the construction of a mercantile contract, to show that phrases or terms used in the contract have acquired, by the custom of the locality, or by the usage of trade, a peculiar signification not attaching to them in their ordinary use, and this whether the phrases or terms are in themselves apparently ambiguous or not.' And again it is stated in the same work (p. 216) 'that parol evidence is competent to annex to a contract a custom or usage of the business and locality known to the parties, or so generally and well settled as to be presumed to be known to them, and with reference to which they must be deemed to have contracted.' As the contract in this case contains no stipulation as to the method by which the quantity of brick was to be ascertained for settlement, but is silent, or at least ambiguous, in that respect, parol evidence was admissible to show whether there was any agreement between the parties as to this matter, and if so, what it was; and if there was no agreement between them, then to show what was the custom of the locality where the contract was made, or the usage of trade, and with reference to which, in the absence of any special agreement they are to be deemed to have contracted.' Judge Riely cites, as sustaining his opinion, *Lowe v. Lehman*, 15 Ohio St. 139; *Ford v. Tirrell*, 9 Gray (Mass.) 401; *Hinton v. Locke*, 5 Hill (N. Y.) 437; *Walls v. Bailey*, 49 N. Y. 464, 10 Am. Rep. 407.

"In this case of *Richlands, &c. Co. v. Hillebeitel*, *supra*, the supreme court affirmed the ruling of the lower court in holding complainant was entitled to have the number of brick in the glass factory laid by contract work estimated and paid for by measurement, computing the same at twenty-two bricks to the cubic foot.



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"Let us now, as on a demurrer to the evidence, apply the law of this case, as laid down by Judge Riely, to the case at bar. Under the contracts with the plaintiff the contracts provided that 'price of bricks furnished and laid in sewer were (at so many dollars) \$20.50 per M' for penitentiary sewer and extensions of this sewer near C. & O. Ry. and on 2nd street; the extensions being of the original contract. As I take it from the evidence, there was no local custom or usage by which this clause of the contract could be interpreted, as this was the first time that contractors were required to furnish at their own expense the cement used for the laying of the bricks in the sewer. Theretofore, the defendant had always furnished the cement used. The plaintiff for the first time did sewer work for the defendant, and testifies that no information was given to him, and that he had no knowledge of the fact that he was to be paid for the bricks laid according to the actual numerical count of the bricks, and that he knew of no such custom of the engineer's office, and although it was the custom, as testified to, that it was the rule to count the bricks in the horizontal or running sewer, but to measure the manholes, the plaintiff testified that he did not know of the rule or custom or the distinction between horizontal sewers and manholes as to the counting of bricks in the one case and the measurement in the other, and as a matter of fact the bids introduced in evidence show that Barry alone bid the same on both horizontal sewers and manholes. There being no local usage or custom which should control in the interpretation of the meaning of this clause of the contract, then the usage of trade with reference to which, in the absence of any special agreement, they are to be deemed to have contracted, must prevail, provided such usage of trade or universal custom is established by the evidence.

"The question is here fairly met by the testimony of General Henry T. Douglas, Mr. York and Mr. Blanton.

"General Douglas is asked, 'In following your profession.

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has it come within your duty to have the construction of culverts, sewers or drains?" His answer is, 'Yes.' He is then asked, 'Has that been so in Virginia as well as in the other States mentioned by you?' His answer is, 'Yes.' He is then asked, 'Please state what is the custom in ascertaining the number of bricks in a sewer or culvert.' Answer, 'The custom is to measure the area of the completed work and taking the area of the bricks before they were placed in the work to arrive at the quantity in cubic yards or in thousands.' He is then asked, 'Do you mean by that, that the number of bricks is ascertained by measurement?' Answer, 'I do.' He is then asked, 'Is that the universal custom, so far as you know?' Answer, 'Yes.' The next question is, 'Did you ever know of it being ascertained by attempting to count the number of bricks in a sewer?' Answer, 'I never did.' He is then asked, 'When the contract says that the price to be paid for brick laid in a sewer at so much a thousand is it, or not, customary to ascertain the number by measurement?' Answer, 'My usual custom has been to ascertain by measurement and as far as I know every other engineer that I am familiar with.'

"To the same effect is the testimony of Charles S. York, consulting engineer, and of A. Cole Blanton, Esq. Mr. York who testifies that he is inspecting engineer for the new sewerage system that is being introduced in Baltimore city, and who has practiced his profession in Maryland, Virginia, both the Carolinas, Georgia, Pennsylvania, New York and Delaware, in answer to the question, 'In the experience that you have had, can you state, whether or not it is the custom to ascertain the number of bricks to be paid for in sewers, culverts, drains and arches by measurement or by counting the brick?' He answers, 'I never heard of counting the brick. They are always paid by measurement and in no other way. I don't see how we could draw a contract well to have work done satisfactorily and equitably between contractor and parties concerned, by

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counting the brick. Generally, after the work is done, we measure up the work and we allow twenty-one bricks to a cubic foot and pay accordingly; that has been the only custom I have ever known or ever heard of.'

"I shall content myself with referring merely to the deposition of A. Cole Blanton with the statement that it corroborates the testimony of General Douglas and Mr. York.

"Thus, it will be seen that there is ample proof of the usage of trade and universal custom. As opposed to this is the evidence of the city engineer, for whose character and ability this court entertains the highest opinion; but on the demurrer to the evidence, under the rule laid down by our own supreme court as shown by the cases cited, *supra*, this evidence in conflict with that of Douglas, York and Blanton goes out, and we have it conclusively established that according to the usages of trade and the universal custom, the price of bricks laid in the sewer at \$20.50 per 'M' means, and meant at the time of the making of the contract, that the bricks, both for the horizontal sewer as well as for the manholes, were to be paid for by measurement and not by count. This usage of trade or universal custom, by operation of law, is read into the contract and becomes a part of the contract, as much so as if written into the contract '*in totidem verbis*.'

"This being so, we are brought face to face with the proposition, whether the provision in the contract, that the city engineer shall decide all questions, difficulties and disputes, of whatever nature, which may arise relative to the construction, prosecution and fulfillment of this contract, and as to the character, quality, amount and value of any work done, materials furnished under or by reason of this contract, and his estimates and decisions upon all claims, questions and disputes, shall be final and conclusive upon the parties hereto.

"But before discussing the question raised by this provision of the contract, the court should pass upon the admissibility

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of the evidence of Douglas, York, Blanton and West, which logically should have been passed upon before the discussion, *supra*; but as the court in its opinion holds this evidence admissible, this is a mere matter of form in the preparation of the court's opinion, and is not a matter of substance.

"This case is not the case of the *Oriental, &c. Co. v. Blades & Co.*, 103 Va. 740-41, 50 S. E. 270, for here there is an ambiguity which it is proper to introduce testimony to explain, and to which the testimony of the engineers introduced by the plaintiff gives a fixed and definite meaning according not to local usages or customs, but according to general usages of trade and the universal custom. The true rule, as I gather it from the cases, is that local and particular usages or customs need not be specially pleaded. See the collection of authorities and statement of the law in 12 Cyc. 1097, under head of pleading 96. As I read the Virginia authorities, I see no case contrary to this weight of authority when fairly analyzed. This being the law, as I take it, we have on this demurrer to the evidence a fixed meaning to the language, 'price for bricks furnished and laid in sewer twenty dollars and fifty cents (\$20.50) per M,' used in the contract for the penitentiary sewer and extensions. Having arrived at this conclusion as to the admissibility of the evidence showing the meaning of the language just above quoted, I am of opinion that, under the rulings of *Mills & Fairfax v. Norfolk & W. R. Co.*, in the two cases, 90 Va. 523-530, 19 S. E. 171, and 91 Va. 613, 22 S. E. 556, and cases cited, for the city engineer under the provision of the contract above quoted to give a decision contrary, would be for the arbitrator to violate the provisions of the contract and to break a provision of the contract made a part of it by law. And in addition, as under the rule as to the effect of a demurrer to the evidence, the jury had a right to believe the statement of Thomas Barry, that shortly after the beginning of the work the city engineer informed him that the work would be

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measured and not counted as Mr. Wilkerson was doing, Barry testifying that as he understood Col. Cutshaw he stated substantially that he would be paid by measurement and not by count. This was a question of fact for the jury, and on the demurrer to the evidence, the city engineer's evidence (Col. Cutshaw), who testifies that he never made such a statement, goes out. And, therefore, as the jury had a right to believe Barry and give full weight to his testimony, the court must do so, and therefore, in addition to the contract itself, when the universal custom and general usage of trade is read into it; this court feels constrained to give judgment as to the penitentiary sewer and extensions in favor of the plaintiff.

"Applying the same rules of law, as governing a demurrer to the evidence, as are set out in the beginning of this opinion, and the authorities cited to sustain them, the court feels constrained to give judgment in favor of the plaintiff for the Orleans street sewers, in which measurement is written into the contracts. There is, as I understand the argument of the learned city attorney, no charge of actual fraud in the making of the changes in the proposals—the changes are there and the words measurement are added and were added before the contracts were signed. The ambiguity was cured by the insertion in these contracts of the term 'measurements,' showing they were to be measured and not counted. Certainly the jury had a right from the evidence in this case to so hold; that being so, this court on a demurrer to the evidence must so hold.

"The court holds that there being no waiver set out in the grounds of demurrer, it is at least doubtful whether it can be considered here. In addition, the question of waiver, being a question of fact as well as law, the jury might have well held under the evidence that no waiver was proven.

"Finally, the court holds that sufficient claim was made as to Orleans street sewer to Mr. Bolton, who refused it, when taken in connection with claim made before the committee as

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testified to, Barry, p. 11 of the deposition. And in addition the contract fails to show necessity for more formal claim.

"The demurrer to the evidence, as to the claim for lumber left in the sewers and trenches will be sustained in favor of the defendant, the city of Richmond, and judgment thereon given in favor of the defendant, notwithstanding the verdict of the jury.

"The demurrer to the evidence as to the claims for bricks laid in penitentiary sewer and extensions and Orleans street sewers will be overruled and judgment given for plaintiff in accordance with verdict of the jury in these cases. An order will be prepared in accordance with this opinion, which is directed to be filed with the record and made a part thereof."

It appears, however, that in the above opinion and the judgment entered pursuant thereto, to which this writ of error was awarded, there was unintentionally allowed, as is conceded, in the claim of defendant in error for brick work, etc., in the Orleans street sewers, the sum of \$88.32, for sheathing required to be left in those sewers; therefore, the judgment to the extent that it allows a recovery of said sum of \$88.32 will be corrected and as so corrected will be affirmed.

*Amended and affirmed.*

## Syllabus.

**Richmond.**

## CHESAPEAKE AND OHIO RAILWAY CO. v. PEW.

March 11, 1909.

1. **STATUTES—Foreign Statute—Construction—Presumption.**—Where a foreign statute which has received the construction of the State from which it comes, has been incorporated into the statute law of this State, it will be presumed that the legislature likewise adopted the construction placed upon the statute by the courts of the foreign State.
2. **CARRIERS—Initial Carrier—Acts on Its Own Line—Liable as at Common Law.**—The liability of an initial carrier of goods under section 1294-c (24) of the Code of 1904, with respect to acts done on its own line, remains as at common law, and is that of an insurer.
3. **CARRIERS—Restricting Liability—Code, Sec. 1294-c (24)—Insurers.**—Under section 1294-c (24) of the Code of 1904, contracts exempting common carriers from their common law liability, either with respect to the amount or degree of their liability as insurers, are invalid.
4. **STATUTES—Code, 1904—Section Headings Not Law.**—The titles in black face type found at the head of the sections of the Code of 1904 were placed there for convenience by the compiler of the Code, and are no part of the statutes.
5. **STATUTES—Construction—Titles of Acts—Acts 1902-3-4, pp. 388, 968.**—The title of an act is frequently of value in the exposition of statutes, as a guide to the legislative intent, but there is nothing in the title of the acts under consideration (Acts 1902-3-4, pp. 388, 968) to divert the court from a meaning plainly to be gathered from the history of the legislation and in harmony with the manifest public policy of the State.
6. **CARRIERS—Liabilities for Goods—Insurer—Restricting Liability—Code (1904), Sec. 1294-c (24).**—Under section 1294-c (24) of the Code of 1904, the liability of a common carrier of goods with respect to goods lost on its own line is that of an insurer except against losses occasioned by the act of God, or a public enemy.

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Statement.

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or of the shipper, or the nature or inherent qualities of the goods shipped, and a contract with a common carrier whereby, in consideration of a reduced rate, a shipper agrees to accept an agreed sum, less than the true value of goods lost, is invalid.

Error to a judgment of the Circuit Court of the city of Williamsburg and the county of James City in an action of trespass on the case. Judgment for the plaintiff. Defendant assigns error.

*Affirmed.*

This action was brought to recover damages to two car loads of cattle, some of which were killed and others injured, while in transit over the defendant's road. The cattle were shipped from Columbia, Virginia, to Grove, Virginia; both points being on defendant's railroad. There was no connecting carrier. The cattle were killed or injured in a wreck causing the derailment of the cars in which they were shipped, and it was contended, among other things, that the wreck was not occasioned by any negligence on the part of the company, and that the company was protected by its contract with the shipper, as the statute only prohibited contracts against its negligence.

The defendant stated the following grounds of defense:

1. That injury and loss was not occasioned by any negligence of the railway company; (2) that the injury and loss, if any, proceeded from and was due to inevitable accident, for which the railway company is no way liable; (3) that the plaintiff refused to receive such of the cattle embraced in said shipment to M. B. Garnett as were not killed; (4) that the damages sought by the plaintiff, if any, are beyond the amount which might be recovered, even if any liability might be imposed upon the defendant; (5) that the defendant is not answerable in damages in any respect to the plaintiff.

*R. G. Bickford and S. O. Bland*, for the plaintiff in error.

*Garnett & Pollard, N. L. Henly and Braxton, Williams & Eggleston*, for the defendant in error.



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WHITTLE, J., delivered the opinion of the court.

This is an action of trespass on the case to recover damages arising out of an intrastate shipment of cattle, the property of the defendant in error, J. N. Pew, over the road of the plaintiff in error, the Chesapeake and Ohio Railway Company, the initial carrier. Some of the cattle were killed and others injured in course of transportation under circumstances which it is alleged render the carrier liable for the damage sustained.

To a judgment against the company for the value of the cattle, this writ of error was awarded.

The principal assignment of error draws in question the ruling of the circuit court denying the validity of certain stipulations contained in the bill of lading, whereby, in consideration of a reduced rate for transportation of the cattle, the company seeks to limit the measure of its duty as a common carrier, and the shipper obligates himself to accept an agreed value, less than the true value of the cattle, in the event of loss for which the carrier is responsible.

The company insists that in no event can it be held answerable in damages under a correct construction of section 129' (24), Va. Code 1904, unless the plaintiff proves that the injury to the cattle resulted from its negligence; and, in that event, that the amount of the recovery must be limited to the agreed value of the cattle.

The trial court resolved both propositions against the contention of the company, instructing the jury that, if they believed from the evidence that the defendant company received the cattle for transportation, and that they were killed, lost or destroyed, they must find for the plaintiff, unless such killing, loss or destruction was due to the act of God, or the public enemy, or the peculiar nature or inherent qualities of the cattle, or to the act or fault of the shipper.

The court, moreover, told the jury, that the stipulation in the bill of lading limiting the value of the cattle, in case of loss, to an amount less than their true value, was invalid.

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The correctness of this ruling depends upon the proper construction of section 1294c (24).

The first sentence of the first paragraph of that section renders the initial carrier, receiving goods for transportation, liable for any loss or damage caused by his negligence or the negligence of any connecting carrier to which such property may be delivered, or over whose lines such property may pass; and the fact of loss or damage in such case shall be *prima facie* evidence of negligence. This provision, except to the extent to which it undertakes to make the initial carrier liable for loss or damage occurring on the lines of connecting carriers, is simply declaratory of the common law. The next provision allows the initial carrier to recover from the connecting carrier the amount of any loss, damage or injury it may be required to pay to the owner of such property on account of the latter's negligence. Then follows the provision upon which the recovery in this case is founded, namely, that "no contract, receipt, rule or regulation shall exempt any such carrier, railroad or transportation company from the liability of a common carrier which would exist had no contract been made or entered into."

This enactment is a composite piece of legislation. The first sentence of the first paragraph was taken from the Missouri statute (Laws of Missouri, 1879, p. 171, Revised Stat. of Missouri, 1889, sec. 994), while the concluding sentence of the paragraph was adopted from the Iowa statute (Code of Iowa, 1897, sec. 2074).

It is a familiar rule in the interpretation of statutes, that where a foreign statute, which has received the construction of the courts of the State from which it comes, has been incorporated into the statute law of this State, it will be presumed that the legislature likewise adopted the construction placed upon the statute by the courts of the foreign State. *Doswell v. Buchanan*, 3 Leigh, 394, 410, 23 Am. Dec. 280; *Danville v.*

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*Pace*, 25 Gratt. 1, 5, 18 Am. Rep. 663; *N. & W. Ry. Co. v. Cheatwood's Admr.*, 103 Va. 356, 367, 49 S. E. 489.

Applying that rule to the interpretation of the statute in question, we find that the Missouri courts hold, that the liability of an initial carrier, with respect to acts done on its own line, remains as at common law. *Hurst v. St. Louis, &c. Ry. Co.*, 117 Mo. App. 25, 94 S. W. 797; *Ball v. Wabash*, 83 Mo. 574; *McCann v. Eddy*, 133 Mo. 59, 33 S. W. 71, 35 L. R. A. 110.

So, also, as to the concluding sentence of the first paragraph of section 1294c (24), taken from the Code of Iowa, the courts of that State have uniformly held invalid contracts exempting common carriers from their common law liability, either with respect to the amount or degree of their liability as insurers. *McDaniel v. Chicago & N. W. R. Co.*, 24 Iowa, 412; *McCoy v. K. & D. M. R. Co.*, 44 Iowa, 424; *McCune v. B. C. R. & N. Ry. Co.*, 52 Iowa, 600, 3 N. W. 615; *Lucas v. Ry. Co.*, 112 Iowa, 594, 84 N. W. 673.

In considering this subject; Hutchinson on Carriers (3rd ed.), section 237c, observes: "In some of the States, however, it has been deemed contrary to the true policy of the State to permit the carrier to limit his common law liability by any contract whatever. Prohibition of such contracts has been declared by statute in Kansas, Iowa, Texas, while in Nebraska and Kentucky they are forbidden by the Constitution."

See also a full and valuable discussion by Judge Freeman of "limitation of carrier's liability in bills of lading," in notes to *Chicago, etc. Ry. Co. v. Calumet, etc. Farm*, 82 Am. St. Rep. 68, 74, *et seq.* At pp. 129, 130, the learned annotator says: "In a few of the States this has been carried to the extent of prohibiting a common carrier from in any way limiting his liability as it exists at common law. Such prohibitions are to be found in the Constitutions of Kentucky and Nebraska, and by statute in Iowa and Texas."

The Missouri cases, *supra*, show that the liability of the initial carrier for acts done on its own line is that of an in-

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suror, as at common law; and that the object of the Missouri statute, corresponding to the first sentence of the first paragraph of section 1294c (24), is to apply the English rule of liability to the initial carrier, where there is an initial carrier and a connecting carrier, and does not affect the liability of a carrier where the transportation is wholly over its own line.

It follows, therefore, that the first sentence of the section has no application to the case in judgment, which is controlled by the concluding sentence of the first paragraph, as interpreted by the decisions of the Iowa courts to which reference has been made.

Nor is this view of the enactment influenced by the title in black-face type found at the head of the section. That title was inserted by the compiler of the Code as matter of convenience.

The original act, which is known as "The Claytor Act," was passed May 16, 1903, under the title, "An act prescribing the liability of common carriers, railroads or transportation companies for any loss, damage or injury to property caused by its negligence or the negligence of any other common carrier, railroad or transportation company, to which said property may be delivered, or over whose line such property may pass." Acts 1902-3-4, p. 388. The "Claytor Act" was carried into the Code by the compiler as section 1294l. On January 18, 1904, however, the legislature passed a new act, entitled "An act concerning public corporations." That statute re-enacts "The Claytor Act" and is embodied in Va. Code, 1904, as section 1294c (24), Acts 1902-3-4, p. 968.

We are not unmindful of the fact that the title of an act is not infrequently of value in the exposition of statutes, as a guide to the intention of the legislature; but there is nothing in the title to the present enactment to divert us from a meaning plainly to be gathered from the history of the legislation, and more especially as our conclusion is in harmony with the manifest public policy of the State.

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Having thus reached the conclusion that the case comes within the control of the provision in section 1294c (24), that "no contract, receipt, rule, or regulation shall exempt any such common carrier, railroad or transportation company from the liability of a common carrier which would exist had no contract been made or entered into," the plaintiff in error is necessarily relegated to its common law liability. It, therefore, only remains to inquire what the liability of a common carrier is with respect to goods delivered to him for transportation, under the doctrine of the common law, in the absence of all contract whatsoever on the subject.

That question was definitely answered in England in the year 1785, by the decision of the court of King's Bench, in the case of *Forward v. Pittard*, 1 Term Rep. 27. In that case the plaintiff delivered to the defendant, a common carrier, twelve pockets of hops to be carried to Andover and forwarded to Shaftsbury by the carrier's wagon. The hops were consumed by accidental fire while in transit, without negligence on the part of the defendant. Lord Mansfield delivered a notable judgment in the case, in which, among other things, he said: "The question is whether the common carrier is liable in this case of fire. It appears from all the cases for one hundred years back that there are events for which the carrier is liable independent of his contract. By the nature of his contract, he is liable for all due care and diligence; and for any negligence he is suable on his contract. But there is a further degree of responsibility by the custom of the realm, that is, by the common law; a carrier is in the nature of an insurer. It is laid down that he is liable for every accident, except by the act of God, or the King's enemies."

This statement of the common law rule has been followed by this court in *Murphy, Brown & Co. v. Staton*, 3 Munf. 239, and *Friend v. Woods*, 6 Gratt. 189, 192.

The recent case of *C. & O. Ry. Co. v. Beasley*, 104 Va. 788, 52 S. E. 566, 3 L. R. A. (N. S.) 183, arose under section

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1294c (25), or rather under the corresponding section (1296) of the Code of 1887; and the court held that "a contract with a common carrier, whereby, in consideration of a reduced rate, a shipper agrees to accept an agreed value, less than the true value, of goods lost by the negligence of the carrier, is invalid. \* \* \*"

Our conclusion is that, so far as the rights and liability of an initial carrier with respect to goods lost on its own line is concerned, there is no difference in legal effect between a liability arising under the last sentence of the first paragraph of section 1294c (24) and under 1294c (25)—except, of course, that liability under the latter clause is predicated on the negligence of the carrier, while under the former it is not. That is to say, a common carrier can no more exempt itself by contract from liability for loss or injury to goods committed to it for transportation in the one instance than in the other.

There are numerous minor assignments of error, which have received careful consideration, but which need not be noticed further than to observe, that the construction which we have placed on section 1294c (24) eliminates the main contentions of the plaintiff in error; that the admissible evidence in the case is plainly sufficient to sustain the finding of the jury; and that no more favorable verdict for the defendant could properly have been rendered. See *Taylor v. B. & O. R. Co.*, 108 Va. 817, 62 S. E. 798, 2 Va. App. 650, 651, and authorities cited.

We find no reversible error in the record, and the judgment must be affirmed.

*Affirmed.*

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Syllabus.

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**Richmond.****CHESAPEAKE & OHIO RAILWAY CO. v. HALL'S ADMINISTRATOR.**

March 11, 1909.

1. RAILROADS—*Personal Injury—Grade Crossing—Failure to Give Signals—Other Warnings.*—The personal representative of one killed at a grade crossing of a railroad is not entitled to recover of the railroad company although the statutory crossing signal was not given, if other warnings were given which in fact notified the deceased of the approach of the train, or would have notified him if he had been exercising ordinary care, so that he could have avoided the injury.
2. RAILROADS—*Personal Injury—Grade Crossing—Duty of Traveler—Failure to Give Signals—Contributory Negligence—Case at Bar.*—It is the duty of one about to cross a railroad at grade to make vigilant use of his eyes and ears to ascertain whether a train is approaching from either direction, and to make such use at a time when and place where looking and listening will be effective, and a failure to do so is, as a rule, such contributory negligence on his part will bar recovery. The failure of the railroad company to give the statutory signal for the crossing is negligence, but does not excuse the performance of the traveler's reciprocal duties, and does not entitle the traveler to recover unless it was the sole proximate cause of the injury complained of. In the case at bar, the proximate cause of the death of the plaintiff's intestate was a thoughtless disregard of the obvious duty to look and listen before going upon defendant's track, and there can be no recovery.
3. NEGLIGENCE—*Self-Imposed Emergency.*—The rule that a person confronted by a sudden emergency or peril is not required to exercise the degree of care required of prudent persons under ordinary circumstances is not applicable where the emergency is self-imposed.
4. RAILROADS—*Persons Approaching Track—Presumption—Last Clear Chance.*—Trainmen who see persons approaching a crossing

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usually have the right to presume that they will not go on the track in front of a rapidly approaching train, and if they do so when it is too late to avoid injuring them, the doctrine of last clear chance has no application.

Error to a judgment of the Circuit Court of Hanover county in an action of trespass on the case. Judgment for the plaintiff. Defendant assigns error.

*Reversed.*

The opinion states the case.

*Henry Taylor, Jr.*, for the plaintiff in error.

*Leake & Carter and H. Carter Redd*, for the defendant in error.

HARRISON, J., delivered the opinion of the court.

The administrator of Laura Alice Hall, deceased, brings this suit to recover of the Chesapeake and Ohio Railway Company damages for its alleged negligent killing of the plaintiff's intestate at a public crossing at Beaver Dam, a station in the county of Hanover.

The case has been twice tried, the first trial resulting in a verdict in favor of the plaintiff, which verdict, on motion of the defendant company, was set aside. Upon the second trial, the same evidence as that taken on the first trial was introduced, to which the defendant demurred. The court overruled the demurrer to the evidence, and gave judgment in favor of the plaintiff for the damages which had been ascertained by the jury. The defendant company asks that this judgment be reversed, and that this court will, on the demurrer to the evidence, enter judgment in its favor.

On the day of the accident in question, the plaintiff's intestate was in Thompson's store at Beaver Dam station making some purchases, when Mr. Thompson came to the west door of



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the store and called to his son, who was waiting on the deceased, and told him that the train which he, the son, had to meet was coming. Thereupon, the younger Thompson and the deceased left the store together, the former with the declaration that he had to meet the train and running in the direction of the crossing which was very near the depot, while the deceased followed in her buggy until her horse was nearly across the track, when the buggy was struck by the engine of an east-bound passenger train and she was killed.

There was a train shortly due at Beaver Dam from the east going west, a fact known to the deceased, and it is claimed that it was this train she supposed was coming, and not one from the west.

From Thompson's store to the little bridge in the county road where she turned to cross the track, a distance of more than 100 yards, she was facing east, and could see the railroad from that direction for a distance of more than  $\frac{1}{4}$  of a mile. The deceased, therefore, had ample opportunity to discover that no train was in sight from that direction; besides, no train coming from the east was a source of danger to anyone crossing the track, because, as shown, all west-bound trains stop before reaching or just as they reach the crossing to take water.

The train by which plaintiff's intestate was killed was the second section of a passenger train, running east at a rate of speed variously estimated at from forty to sixty miles per hour. On the demurrer to the evidence it must be taken as proven that the engineer did not sound the crossing signal, nor ring the bell, as prescribed by the statute. The station whistle was blown, however, and such other noises made by the approaching train that practically every one about the crossing heard and knew that the train was rapidly approaching. Although the statutory crossing signals were not given, yet if the defendant gave another or other warnings which in fact notified the plaintiff's intestate of the approach of the train, or which would have given her notice if she had been exercising ordinary care.

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so that she could have avoided the injury, she would not have been entitled to recover. *A. & D. R. Co. v. Reiger*, 95 Va. 418, 28 S. E. 590; *Simmons v. Southern Ry. Co.*, 96 Va. 152, 31 S. E. 7.

Admitting, however, that the defendant was guilty of actionable negligence in approaching the crossing without sounding the warnings required by statute, the plaintiff could not recover in this case, because his intestate is clearly shown to have been guilty of contributory negligence.

It is not to be lost sight of, in a case like this, that the negligence of the railroad company does not excuse the performance of the traveler's reciprocal duties. Such negligence does not entitle the plaintiff to recover unless it be the sole proximate cause of the injury complained of. It is the duty of the traveler in the full enjoyment of his faculties of hearing and seeing, upon a highway approaching a railroad crossing, before he attempts to drive or pass over, to exercise a proper degree of care and caution, and to make vigilant use of his eyes and ears for the purpose of ascertaining whether a train is approaching; and if by a proper use of his faculties he could have escaped injury and fails to do so, and is injured, he is chargeable with contributory negligence, and cannot maintain an action against the company; and this rule applies, although the railroad company fails to give the proper cautionary signals. He must look in every direction that the rails run to make sure that the crossing is safe, and his failure to do so will, as a general rule, be deemed culpable negligence; and the looking and listening must be when to look and listen will be effective. The duty to look and listen imposed upon a traveler on a highway approaching a railroad crossing is a continuing duty, and if there is any point at which, by looking and listening, a person injured could have avoided the accident, and failed to do so, then he has neglected to discharge a duty which the law imposes, and his contributory negligence defeats a recovery for the injury. These principles are firmly established, and

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are reiterated in numerous decisions of this court. *Southern Ry. Co. v. Hansbrough*, 107 Va. 742, 60 S. E. 58, 1 Va. App. 701; *Smith v. N. & W. Ry. Co.*, 107 Va. 729, 60 S. E. 56, 1 Va. App. 773; *Southern Ry. Co. v. Jones*, 106 Va. 412, 56 S. E. 155; *Stokes' Admr. v. Southern Ry. Co.*, 104 Va. 817, 52 S. E. 855; *Brammer's Admr. v. N. & W. Ry. Co.*, 104 Va. 50, 51 S. E. 211.

From Thompson's store to the little bridge in the county road was a very short distance. When the plaintiff's intestate turned at the bridge to proceed across the railroad track, she could see west along the railroad an approaching train for a distance of 685 feet. Her father was on the opposite side of the track and in front of her, and shouted at her and waved to her with the object of getting her to turn off and not go upon the track in front of the approaching train, but his efforts to attract her attention were as unavailing as the roaring of the train which had apprised everyone else of its approach. As she approached the track from the bridge, she could see farther and farther west, and when she was twenty-nine feet from the center of the track, had she looked, she could have seen a train approaching from the west for a distance of more than 3,000 feet.

It is manifest that after turning at the bridge she did not once look to the west. Had she done so, it would have been impossible for her to have failed to both see and hear this fast approaching train, which, according to the plaintiff's testimony, was rumbling so as to shake the ground and houses in the vicinity of the depot and crossing. The facts of this case admit of no other conclusion, than that this unfortunate lady never once looked to the west to ascertain if the crossing was safe from danger in that direction until her horse was on the rails, when it was too late to avert the calamity which inevitably followed. Why she did not look we do not know, but it is clear that her thoughtless disregard of this obvious duty was the proximate cause of her death, and precludes the right of recovery.

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It is claimed that the deceased, a woman, was in a perilous position, and that a person in an emergency or great peril is not required to exercise the prudence required of prudent persons under ordinary circumstances.

This principle does not apply in a case like this, where the party has been brought into the peril which disturbs the judgment by his own fault. It is only applicable where the person has been placed in the situation of danger by the negligence of the defendant, not united with his own negligence. *Smith v. N. & W. Ry. Co., supra.*

Nor has the doctrine of the last clear chance any application to the facts of this case. The fireman first saw the deceased when she was about to turn upon the little bridge in the direction of the crossing, but he did not know that she was going to attempt to cross, and he had a right to presume that she was not going to drive on the track in front of a rapidly moving train in plain view. *Southern Ry. Co. v. Daves*, 108 Va. 378, 2 Va. App. 309. When he realized that she was going to attempt to cross, there was nothing that he could do to save her. He did not even have time to call to the engineer.

The judgment of the circuit court, upon the demurrer to the evidence, in favor of the plaintiff must be reversed and set aside, and this court will enter such judgment as the circuit court ought to have entered in favor of the defendant.

*Reversed.*

## Syllabus.

**Richmond.**

## COMMONWEALTH v. McCUE'S EXECUTORS AND OTHERS.

March 11, 1909.

Absent, Keith, P.

1. **CRIMINAL LAW—Costs of Prosecution—Execution Without Formal Judgment**—Code, Section 4087.—Under section 4087 of the Code, the accused, in every criminal case, is liable for the costs of his conviction, without any formal entry of the judgment therefor. The clerk of the court is required to make up a statement of all expenses incident to the prosecution and to issue execution therefor as though judgment had been rendered therefor in favor of the Commonwealth against the accused as a fine. The costs are no part of the punishment of the accused, but are given simply to reimburse the State for necessary expenditures in the enforcement of its violated laws.
2. **CRIMINAL LAW—Costs—Enforcement by Auditor—Consent of State—When State Not a Party to Proceedings**.—The auditor of public accounts, under the statute law of this State, is the only officer empowered to institute proceedings for the collection of costs due the State in a criminal prosecution. If the claim for such costs be asserted in a chancery suit by the local attorney for the Commonwealth, without the consent and approval of the auditor, it is a proceeding without authority, the State does not thereby become a party, and is not bound by any decree affecting her rights. The State cannot be impleaded without her consent.
3. **ESTOPPEL—Refusal of One Court to Take Jurisdiction—Application to Another Court**.—The refusal of a court to take jurisdiction of a claim because another court of competent jurisdiction has sole jurisdiction of the case does not estop the creditor from asserting his claim in the latter court.
4. **EXECUTORS AND ADMINISTRATORS—Bill to Convene Creditors—When Claims May be Asserted**.—A creditor has the right to assert his

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claim against the estate of a decedent in a suit where the estate of such decedent is being administered at any time before the assets of the estate have been administered.

Appeal from a decree of the Corporation Court of the city of Charlottesville in the chancery suit of *McCue's Ex'ors v. McCue and others*, in which the Commonwealth of Virginia filed her petition. Decree for the defendants in the petition. The Commonwealth appeals.

*Reversed.*

The opinion states the case.

*Attorney-General Wm. A. Anderson and A. D. Dabney*, for the Commonwealth.

*Harmon & Walsh and E. O. McCue*, for the appellees.

HARRISON, J., delivered the opinion of the court.

J. Samuel McCue was convicted on the 9th of November, 1904, of the murder of his wife, and the question presented by this appeal is whether his estate is liable for the costs incurred and paid by the Commonwealth in his prosecution for that offense.

That the accused, in every criminal case, is liable for the costs of his conviction plainly appears from the statute, which is as follows: "*In every criminal case, the clerk of the court in which the accused is convicted, or, if the conviction be before a justice, the clerk to which the justice certifies as aforesaid, shall, as soon as may be, make up a statement of all the expenses incident to the prosecution, including such as are certified under the preceding section, and execution for the amount of such expenses shall be issued and proceeded with; and chapter thirty-one shall apply thereto in like manner as if, on the day of completing said statement, there was a judgment in such court in favor of the Commonwealth against the accused for the said amount as a fine.*" Code, 1904, sec. 4087.

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More than fifty years ago this statute was considered by this court, and the character of the obligation thereunder of a person convicted of crime to the Commonwealth for the costs incident to his prosecution and conviction was discussed and defined to be an exaction, "simply for the purpose of reimbursing to the public treasury the precise amount which the conduct of the defendant has rendered it necessary should be expended for the vindication of the public justice of the State and its violated laws. It is money paid, laid out and expended for the purpose of repairing the consequences of the defendant's wrong. It is demanded of him for a good and sufficient consideration, and constitutes an item of debt from him to the Commonwealth. Payment of costs is no part of the sentence of the court, and constitutes no part of the penalty or punishment prescribed for the offense. Indeed, our statute expressly declares that the laws of costs shall not be interpreted as penal laws; they are to be construed as remedial statutes, and liberally and beneficially expounded for the sake of the remedy which they administer. The right to enforce payment of them is a mere incident to the conviction, and thereby vested in the Commonwealth for the sole purpose of replacing in the treasury the amount which the defendant himself has caused to be withdrawn from it." *Angela's case*, 10 Gratt. 696, 701.

For some reason, not shown by the record, the clerk of the court did not make up the statement of the costs incident to the prosecution, as contemplated by section 4087 of the Code, until May, 1905, about three months after the accused had been executed, and no execution was issued thereon until the 10th day of March, 1906. In the meantime, this chancery suit had been instituted in the Corporation Court of the city of Charlottesville by McCue's executors to settle up his estate, in which it was asked that the creditors of the testator should be required to prove their debts. It thus appears that at the time the execution was issued for the costs incident to the prosecution and conviction of the accused, the Corporation Court of

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Charlottesville had taken jurisdiction of the estate of the deceased. The execution being unavailing as a means of collecting the debt due the Commonwealth, the Commonwealth's attorney of the city of Charlottesville filed the execution for costs before the commissioner who was, under a decree in this cause, taking an account of the debts of the decedent. The auditor of public accounts being informed of this action declined to assert the claim before the commissioner, and thereafter brought suit, by motion, in the Circuit Court of the city of Richmond against the executors of J. S. McCue, deceased, but that court declined to take jurisdiction of the suit, upon the ground that the Corporation Court of Charlottesville had sole jurisdiction with respect to the matter involved.

In the mean time, a report of debts had been filed in this cause, finding adversely to the claim of the Commonwealth, which report had been, without exception, confirmed. Thereupon, the Commonwealth of Virginia, suing by Morton Marye, auditor of public accounts, filed her petition in this cause, asserting the claim for costs here involved, and asking that so much of the decree of May 29, 1906, as passed upon and rejected her claim be reheard and set aside, and that such claim be ascertained and decreed to be paid out of the assets of the estate of J. S. McCue. A demurrer to this petition by the executors and heirs of J. S. McCue was sustained, and the petition dismissed upon the ground that there was no error of law apparent upon the face of the decree complained of. From this decree the Commonwealth of Virginia has appealed.

It is contended on behalf of the appellees that the petition filed by the Commonwealth in this cause must be considered and classified as a bill of review; and that, under the rules of pleading, it was not permissible for the Commonwealth, in this way, to get a rehearing of the decree by which the Corporation Court of Charlottesville had already adversely adjudicated her right to recover.

This contention is based upon the fallacious assumption that



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the Commonwealth was before the court when the decree relied on as an adjudication of her rights was entered. This position is not tenable. There is no law which authorizes any officer of the State to represent the Commonwealth in the matter of collecting an indebtedness due to her of the character here asserted, other than ch. 30 of the Code of 1904, which expressly makes it the duty of the auditor of public accounts "to institute and prosecute all proceedings proper to enforce the payment of money to the Commonwealth." Code, sec. 681.

It is plain from an examination of the law that the auditor of public accounts was the only officer empowered to institute proceedings for the collection of the indebtedness in favor of the Commonwealth which is here asserted; and it is equally clear that the Commonwealth could not be impleaded without her consent. No power was devolved upon the Commonwealth's attorney of the city of Charlottesville to prove the debt in question before the commissioner who was auditing the claims against McCue's estate in this case, or to institute any other proceeding for its collection; and the finding of the master commissioner adversely to the claim, and the decree of court confirming that finding were without any binding force or effect, so far as the claim now asserted by the Commonwealth is concerned.

This claim for costs was asserted in this cause for the first time in any legal form, or by any competent authority, when the petition of the Commonwealth of Virginia, suing by her auditor of public accounts, was filed herein on the 17th day of June, 1907. Until this petition was filed the Commonwealth was not a party to this suit, and the only officer who had the right to consent that she should be made a party had refused to give such consent. The State could not, over her protest, be made constructively a party, and be bound by an adjudication of her rights, under such circumstances.

It is contended, on behalf of the appellees, that the Commonwealth is estopped from asserting this claim for costs by the judgment of the Circuit Court of the city of Richmond.

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This position cannot be sustained. The judgment of the Circuit Court of Richmond was not upon the merits, but upon a question of jurisdiction, the court holding that the Corporation Court of Charlottesville had sole jurisdiction in the case, and for that reason dismissed the motion. The effect of this judgment was to remand the Commonwealth to the Corporation Court of Charlottesville, and to this suit, then pending therein, for relief.

The Commonwealth had a right, at any time before McCue's estate had been finally administered in this suit, to come in and assert her claim, and ask that provision be made for its payment; and the petition which was filed was a proper and sufficient pleading for that purpose. That it is the right of a creditor to assert his claim against the decedent in a suit where the estate of such decedent is being administered, at any time before the assets of the estate have been disbursed, is the established practice of courts of equity in this State. *Wooding's Executrix v. Bradley's Ex'or*, 76 Va. 614.

We are of opinion that the demurrer to the petition filed by the Commonwealth should have been overruled, the amount of her claim for costs ascertained, if disputed, and a decree entered for its payment out of the assets of the estate of J. Samuel McCue in the hands of his executors to be administered.

The decrees complained of must, therefore, be reversed and set aside, and the cause remanded for further proceedings in accordance with the views expressed in this opinion.

*Reversed.*

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Syllabus.

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## Richmond.

## COLBY v. REAMS.

March 11, 1909.

1. **BILLS OF EXCEPTION—*Unsigned Bill.***—The evidence given on the trial of an action at law is no part of the record unless made so by a proper bill of exception, and a bill not signed by the judge who presided at the trial is not properly authenticated and hence is not a bill of exception.
2. **PLEADING—*Trial Without Issue—Case at Bar—Estoppel.***—As a general rule no judgment can be given upon a verdict rendered as upon the trial of an issue when no issue has been joined. Issue must first be joined on the pleadings. In the case at bar, no plea was filed. An order was made for the defendant to file a statement of his grounds of defense but it was not complied with, and the trial proceeded as if issue had been joined. The plaintiff objected to the introduction of evidence by the defendant controverting his claim, but his objection was overruled. The plaintiff did all that he could to present the defect to the trial court, and hence is not estopped to rely upon the objection in this court.
3. **PLEADING—*Bill of Particulars—Failure to Furnish—Code, Section 3294.***—If a defendant in an action of trespass on the case who has pleaded the general issue of "not guilty" fails to comply with an order requiring him to specify his grounds of defense, he should not be allowed to introduce any evidence controverting the plaintiff's claim, as his plea gives no notice thereof. The object of section 3249 of the Code is to give the adverse party full notice of the character of the plaintiff's claim, or the defendant's defense.
4. **EVIDENCE—*Impeachment of Witness—Introduction of Part of a Paper—Exclusion of Other Parts in Rebuttal.***—Where a portion of a defendant's answer in a chancery suit is introduced on his cross-examination as a party to an action at law for the purpose of impeaching him, by showing a prior inconsistent statement

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about the same matter, he cannot, on re-direct examination, put in evidence the whole answer, but only so much thereof as relates in some way to the statement proved.

Error to a judgment of the Circuit Court of Powhatan county in an action of trespass on the case. Judgment for the defendant. Plaintiff assigns error.

*Reversed.*

The opinion states the case.

*David Meade White* and *W. D. Gray*, for the plaintiff in error.

*W. M. Justis, Jr.*, for the defendant in error.

HARRISON, J., delivered the opinion of the court.

The declaration in this case avers that the defendant wrongfully manufactured into lumber and disposed of certain trees and logs belonging to the plaintiff, and committed other acts of trespass on his premises. This action of trespass on the case was brought to recover of the defendant the damages claimed to have been sustained by reason of these alleged unlawful acts. There was a verdict and judgment for the defendant, which is now before us for review.

Bill of exception No. 9, which was intended to make the evidence a part of the record, is not signed by the judge of the circuit court. The evidence is not a part of the record unless made so by a proper bill of exceptions. It is not a bill of exception, and fails of its purpose, unless it is authenticated by the signature of the judge presiding at the trial. Code, sec. 3385. *Blackwood Coal Co. v. James*, 107 Va. 656, 60 S. E. 90, 1 Va. App. 732.

In this situation of the record there are but two assignments of error that we need notice.

The record fails to show that the defendant entered any plea

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in this case; and it shows that at the April term, 1907, the court, on motion of the plaintiff, entered an order requiring the defendant to file a statement of his grounds of defense on or before ten days prior to the next succeeding term. This order was not obeyed, no statement of the grounds of defense being filed at any time. Bill of exception No. 3 shows that, at the trial, when the defendant offered to introduce his evidence, the plaintiff objected to its introduction because the order of the court requiring the grounds of defense to be filed had not been complied with. The court overruled this objection, and permitted the defendant to introduce his evidence, as stated, under the general issue.

This was error. The general rule applying to all actions will not sustain a judgment given upon a verdict rendered as upon the trial of an issue when no issue has been joined. Issue must first be joined on the pleadings. *Preston v. Salem Imp. Co.*, 91 Va. 583, 22 S. E. 486.

A state of facts might, however, arise upon which the plaintiff would be estopped to object in this court, for the first time, that there had been no formal joinder of issue upon the pleadings. See *Deatrick v. Ins. Co.*, 107 Va. 602, 59 S. E. 489, 1 Va. App. 670. But no such conditions exist in the case at bar, which is governed by the general rule already mentioned. Here the plaintiff did all that he could do. He demanded a statement of the grounds of defense relied on by the defendant, and the court entered an order requiring such a statement to be filed on or before ten days prior to the next succeeding term of the court. This order the defendant did not comply with, and when the plaintiff, for that reason, objected to the introduction of any evidence by the defendant, he was told that the evidence might be introduced under the general issue, when no plea of the general issue had been entered of record. If, however, the general issue had been pleaded, the defendant could not have introduced his evidence under it. That plea.

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in this case, would have been "not guilty," which would have given the plaintiff no notice of the character of the defense.

Section 3249 of the Code provides that, when a statement of the grounds of defense is ordered, and the order is not complied with, the court may, at the trial, exclude evidence of any matter not described in the pleading so plainly as to give the adverse party notice of its character. The object of this section is to give the adverse party full notice of the character of the plaintiff's claim or the defendant's defense. *Columbia Accident Ass. v. Rockey*, 93 Va. 678, 25 S. E. 1009; *Richmond v. Leaker*, 99 Va. 7, 37 S. E. 348; *Tidewater, &c. Co. v. Scott*, 105 Va. 165, 52 S. E. 835, 115 Am. St. Rep. 864.

In the case at bar, the plaintiff was furnished with no notice, and under the terms of the statute the defendant's evidence should have been excluded.

Bill of exceptions No. 4 shows that at the trial the defendant, in his direct examination, testified that certain logs and felled trees, the subject of controversy, were worth only \$75.00. On cross-examination, for the purpose of impeaching him and showing that he had made a different statement under oath about the same matter, the plaintiff read to the defendant, who was testifying in his own behalf, a portion of his answer in a certain chancery suit, and asked him to explain it. On his re-direct examination, the defendant was permitted, over the objection of the plaintiff, to introduce in evidence the whole of said answer. No part of the answer in question was admissible on the re-direct examination of the defendant except that which related to the value of the logs and felled trees in controversy.

The law is stated in Greenleaf on Ev. (15th ed.), Vol. 1, sec. 467, as follows: "Proof of a detached statement, made by a witness at a former time, does not authorize proof, by the party calling that witness, of all that he said at the same time, but only of so much as can be in some way connected with the statement proved. Therefore, where a witness has been cross-examined as to what the plaintiff said in a particular conversa-

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tion, it was held that he could not be re-examined as to the other assertions, made by the plaintiff in the same conversation, but not connected with the assertions to which the cross-examination related, although the assertions as to which it was proposed to re-examine him were connected with the subject matter of the suit."

The whole of the defendant's answer in the chancery suit is not before us, and, therefore, we are unable to say whether or not it all related to the value of the logs and felled trees in controversy. If, however, the question should arise on another trial, what has been said will be a guide to its proper solution.

The judgment complained of must be reversed, the verdict of the jury set aside, and a new trial granted.

*Reversed.*

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Statement.

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## Richmond.

CITY OF RICHMOND v. HARRY L. POORE.

March 11, 1909.

1. **VERDICTS—*Conflicting Evidence.***—The evidence in the case at bar is seriously in conflict as to whether an excavation in one of the streets of the city of Richmond into which the plaintiff fell and was injured, was properly lighted and barricaded at the time of the injury complained of, so as to warn the plaintiff of danger. The determination of this question was peculiarly the province of the jury, and their verdict should not be set aside.
2. **INSTRUCTIONS—*Evidence to Support—Necessary Inferences—Case at Bar.***—Where, in an action against a city to recover damages resulting from falling into a hole in the street, the evidence for the plaintiff tended to show that the hole into which he fell was left unguarded and unlighted, while the evidence for the defendant tended to show that it had been left guarded and lighted only three-quarters of an hour before the accident, it was for the jury to reconcile the evidence, if possible, and an instruction to the effect that the city was not liable if the lights were extinguished and removed without its knowledge or consent between the time they were placed and the time of the accident cannot be said to be without evidence to support it. The jury were forced to this inference, although there was no direct testimony to that effect, or else believed that a number of witnesses were guilty of deliberate perjury.
3. **NEW TRIAL—*After Discovered Evidence—Cumulative and Corroborative.***—The verdict of the jury will not be set aside on the ground of after discovered evidence, where such evidence is merely cumulative and corroborative of what was proved on the trial, or is immaterial.

Error to a judgment of the Circuit Court of the city of Rich-



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mond in an action of trespass on the case. Judgment for the plaintiff. Defendant assigns error.

*Reversed.*

The opinion states the case.

*Henry R. Pollard and Geo. Wayne Anderson, for the plaintiff in error.*

*David Meade White, for the defendant in error.*

CARDWELL, J., delivered the opinion of the court.

The gravamen of the declaration filed in this case by the father and next friend of Harry L. Poore, an infant between twelve and thirteen years of age, is that, by reason of the negligence of the city of Richmond in failing "to use due and proper care and caution to place and erect sufficient barriers around or on the sides" of "the deep and narrow ditch or excavation which had been dug across the sidewalk on the north side of Grace street, between Seventh and Eighth streets, for the purpose of placing a sewer therein," and "to place a sufficient number of lights at night near the said ditch or excavation, so as to give warning to persons of the ditch or excavation, and to prevent persons, and the plaintiff in particular, falling into the deep and narrow ditch dug as aforesaid at the place aforesaid," the plaintiff at or about 6:15 o'clock P. M. on the evening of the 20th day of December, 1906, in the exercise of ordinary care and caution, fell into said ditch or excavation and sustained the injuries for which damages in this action are demanded. The action was against the city of Richmond and the Murphy's Hotel, Inc., because the sewer connection which the city was intending to make was between the property of the hotel company and the sewer of the city, long before laid and in use on the north line of Grace street; but the issue was made up and tried as between the plaintiff and the defendant city.

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The defendant city pleaded the general issue of "not guilty," and relied upon its ground of defense that it had properly guarded and lighted the ditch or excavation across the sidewalk, which it had a right to dig in the exercise of governmental power.

On the first trial of the issue thus presented, a verdict was rendered in favor of the defendants, and the court promptly overruled a motion to set aside the verdict and entered judgment thereon; but at a later day in the term the plaintiff moved the court to set aside the judgment entered as aforesaid, and to sustain the motion presented a petition setting forth the grounds upon which the motion was based, viz., misdirection of the jury, and after-discovered evidence. Ten days later in the term the court granted the motion to set aside said judgment, and granted leave to the plaintiff to renew his motion to set aside the verdict of the jury, which motion was made and granted five months after the trial and judgment therein, and a new trial awarded.

At the second trial there was a verdict and judgment for the plaintiff against the defendant city for damages to the amount of \$3,000, and to that judgment this writ of error was awarded.

The first, and, in our view of the case, the only question for our consideration is the propriety of the court's action in setting aside the judgment and verdict rendered at the first trial.

It appears that on the day mentioned the plaintiff, who was a messenger boy, was sent by his employer to deliver some shoes that had been repaired; that he left the store, which was situated on Main street between Seventh and Eighth streets, about midway of the block, about six o'clock in the evening with the package, which was to be delivered to a party on North Eighth street; that instead of going up Eighth street he went up Seventh from Main to Grace street, two blocks, and then crossed over to the north side of Grace and walked east on Grace street towards Eighth street; that on that day and for two or three days preceding the city had been making a sewer con-

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nection for the Grace-street annex of Murphy's Hotel, Inc., which was still in course of construction; that the sidewalk on the north side of Grace street and on the west side of Eighth street, in front and on the side of the hotel annex, were protected by a covering; that in order to make this sewer connection it was necessary to dig a trench across the sidewalk and into the street; that this work was done by the employees of the city, under the supervision of an experienced foreman and of the assistant city engineer, a civil engineer of long experience and of well recognized ability; that, according to the uncontradicted evidence, there was a large pile of dirt in Grace street, which had been thrown out of the trench and banked in the street south of the trench, and that on this pile of dirt there was a bright white light, and a red lantern on the curb, or on a plank above the ditch. The plaintiff, however, testified that there were no obstructions to prevent persons from walking into the ditch; that he did not get over or crawl under or run into any planks, and on cross-examination declared that he did not see any lights. "There wasn't any there."

He, besides the testimony of physicians as to his injuries, introduced four witnesses, one of whom, Joe Adams (colored), testified that there were two lanterns at the place of the accident; that on the east side he found one light on the board, which rested on barrels, he thought, one being next to the hotel and the other next to the curb stone; that there was a "very bright light" on barrels "out in the street, down in the gutter like," and that there was a barricade on the east side. Another of these witnesses, Caldwell, could only say, "I don't recollect seeing any lights where the hole was"; but then said there was a bank of sand or dirt out in the street, and a light on the bank of sand. The third witness, John H. Tabb, about the first person to get to the trench after the plaintiff had fallen into it, testified that there were two lights there, and that he "crawled under a plank to get to the trench, and he found there a board

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about three feet high," which he found nailed or tied. "I came in contact with the plank, nailed or tied."

There is a sharp conflict in the statement of this witness and that of Adams (colored), the latter testifying in substance, that the only barricade he saw consisted of a board resting on barrels, one being next to the hotel and the other next to the curb stone; while the foreman (Tabb), denying that there was any light (as testified to by Adams) on the barricade which guarded the trench on the east and south side, says that the barricading plank on the east side (the side on which he approached the trench) was so securely fastened to the stanchions at each end (one of which was next to the hotel and the other next to the curb stone) that it bore his weight when he attempted to let himself down into the trench, and that he found it necessary to get under it, and did go under it, in order to enter the trench, the board being about two and one-half feet from the top of the trench. This witness, on cross-examination, stated emphatically that there was a like barricade on the west side of the trench, and that one coming down from the west side, as plaintiff stated he was going, would come in contact with the barricade before reaching the trench, and that in order to get into the trench it would be necessary for a person to get under the barricade; but on re-examination the witness modified his first statement to the extent that he could not say positively that he saw anything on the west side; and on cross-examination said about his first statement, "I made a mistake," meaning doubtless that he could not say positively as to whether there was a barricade on the west side of the trench or not, for the reason that when his whole statement is read he had no occasion or opportunity to ascertain definitely as to what were the obstructions to the approach to the trench from the west, as he approached it from the east and directed his efforts to extricating the plaintiff from that side.

The remaining witness, other than the physician, Joseph Dabney, did not get to the scene until the plaintiff had been

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gotten out of the trench, and although he came up from the east side, unlike other of plaintiff's witnesses who were first to get there, he noticed no obstructions and went "right up to the hole and looked down"; didn't notice any "barrels or planks on the west side and didn't see any lights at all the time I got there," though he had just testified to "a light over the Eighth street side of the hole," and quite naturally the witness does not undertake to say what were the conditions at the place of the accident when it occurred, nor what changes had taken place after the plaintiff had been first found by Tabb and another in the bottom of the trench unable to extricate himself.

On the other hand, the evidence for the defendant city tended to prove that there was an electric light at the corner of Eighth and Grace streets; that permanent barricades were erected directly the work was started on both the east and west sides of the trench opened; that they were in place all the time and never taken down until the work was finished; that they were between four and five feet high, and consisted, on each side of the trench, of upright posts, one at the curbing and one at the building line; that on the east side two boards were nailed, and one placed diagonally, one end on the ground and the other up; that on the west side there were three boards nailed, and one across the center with a lantern tied on it, and that the western barricade was at least five feet from the ditch, and the eastern one at least three feet from it. It further tended to prove that the opening—the trench—on the south side had been protected by the bank of dirt, "twenty-five or thirty loads, away up high, and then a board nailed across on top of that."

The foregoing facts on behalf of the city are testified to by the foreman, and the seven members of the gang engaged in the work of laying the sewer connection between the hotel property and Grace street, from its beginning up to the time of the accident to the plaintiff, and until the completion of the work, each of them testifying that they quit work about half-past five on the evening of the accident, and left the trench

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barricaded in the manner described, *i. e.*, with these permanent barricades lighted with a red and a white light, and that they found substantially the same barricades, lights, etc., in place next morning.

These witnesses were corroborated by the assistant city engineer, Bolton, who says that next morning, before the men went to work, he visited the place, and found exactly the barricades and lights the men say they left there the night before. Another witness, J. T. Disney, an official of the hotel company, testified that he went to the trench after the accident and saw a barricade "across the sidewalk and a lighted lamp on top of the boards across it"—*i. e.*, he saw barricades at both the eastern and western sides, and describes them, as did the other witnesses for the defense, when he states that he saw "also this barricade and lamp about 6 o'clock"; "I saw it between half-past five and six o'clock. I saw the men fixing it up." John Murphy, Jr., another official of the hotel company (the injured plaintiff having been carried into Murphy's hotel after the accident), says, on cross-examination: "I went down to investigate and found planks on both sides (of the trench), and on this side there was a light, two planks criss-crossed on either side"; and that upon his return to the hotel the witness asked the plaintiff how he came to fall in the trench, and that plaintiff replied: "I was coming down the street, and a plank was in my way, and I dodged under it and fell into the hole."

The evidence is clear that the men quit work at the trench about 5:30 P. M., and that the accident occurred about 6:15 P. M.

Upon the evidence related having gone to the jury, the court gave the following instruction, which it is claimed was a misdirection as to the law applicable to the facts which the evidence tended to prove, to-wit:

"A municipal corporation is not an insurer against accidents upon its streets and sidewalks, nor is every defect therein, though it may cause injury, actionable. It is sufficient if the

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streets are in a reasonably safe condition for travel in the ordinary modes, by night as well as by day; and if the surface of a street or sidewalk is not in a reasonably safe condition, and the city has caused such defect by the doing of necessary work therein, it becomes the duty of the city to place suitable barriers to guard against an accident by persons falling into such excavation, and in a reasonable way to display lights to warn persons using the streets of such defect; and if the jury believe from the evidence in this case that on the evening of the accident, and before it happened, the city of Richmond closed and guarded the defect in the street made by it by reasonably suitable barriers, and placed a reasonable number of lighted lamps, and that the same were suitably located in order to prevent the happening of the accident, the city of Richmond cannot be held responsible for the injury to the plaintiff, even though the lamps were afterwards extinguished, and had been removed from their positions at the time when the accident happened, unless it appears from the evidence that the city of Richmond, through its officers and agents, knew, or ought to have known by the exercise of ordinary care, of such removal and extinguishment in time to replace or relight the said lamps before the accident happened."

It is not claimed that the instruction does not correctly state the law, but the effort is made to apply the well settled principle, that "it is error to give an instruction where there is no evidence tending to support it," to the words of the instruction, "even though the lamps were afterwards extinguished, and had been removed from their positions at the time when the accident happened, unless it appears from the evidence that the city of Richmond, through its officers and agents, knew, or ought to have known by the exercise of ordinary care, of such removal and extinguishment in time to replace or relight the said lamps before the accident happened."

It would, as it seems to us, be a quite strained view of the evidence for one to assert that it did not tend to prove the facts

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adverted to in that part of the instruction alone objected to, and that it would clearly be a reflection upon the intelligence of the jury to say that they could have construed the language of the instruction as an expression from the court as to what the facts of the case were, instead of leaving the jury to determine from the evidence what facts it proved. Enough has been stated as to the evidence to show that it "tended to prove"—i. e., that it was persuasive of—two things: First, that the barricades and lights were actually about the trench on the evening of the accident about half-past five o'clock; and, second, that when the accident occurred, about 6:15 o'clock, there were no barriers there and no lights burning where they had been placed. If forced to believe plaintiff's witnesses that there were no barricades, lights, etc., about the trench, the instruction still left the jury, as should have been done, free to say whether or not the barricades, etc., were there when the work stopped at 5:30 P. M., and were removed without authority or knowledge of the city between that time and the time of the happening of the accident, three-fourths of an hour later. The jury should have been, and were, left by the instruction complained of, free to reconcile the evidence, if it was possible to do so, and in this case the jury were by the evidence forced to the inference that the lights had been extinguished and removed, or to believe that either the two or three witnesses for the plaintiff, who swore positively that there were no lights or barricades there, on the one hand, or, on the other, that the ten witnesses for the defendant, who swore there were permanent barriers there from the beginning of the work, with lights at stated points every night and on the night of this accident, were deliberately guilty of perjury.

Counsel for the plaintiff says in his brief that while the evidence for the plaintiff, at the first trial, showed negligence on the part of the defendant city, the only conclusion from the evidence of the defendant, on the other hand, that could be drawn is that the trench was properly guarded and lighted at the time



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of the accident. "Indeed (as counsel further says), there can be no middle ground. The trench was not barricaded and lighted, or it was barricaded at the time of the accident. The mind can reach no other conclusion, nor can it draw any other inference. The evidence cannot be reconciled, nor can it bear out any other theory." In this view of the evidence we fully concur, and further concede that the question was one of fact for the jury; but we are unable to agree that in the light of the evidence the jury at the first trial could have, even by possibility, been misled by instruction No. 5, *supra*, complained of. They may have accepted as true the version of the plaintiffs that the trench was not barricaded and lighted at the time of the accident, and also the version of the defendant that it was left three-fourths of an hour before properly barricaded and lighted; yet it was the province of the jury, in the exercise of which they were left free by the court's instruction, to infer that the lights had been removed without the knowledge of the city or its officers and agents. This is but a fact which the jury might have inferred, and doubtless did infer, from the facts considered proved. Greenleaf on Ev., secs. 44, 48; 16 Cyc. p. 1050; 17 Ibid. 820; *Myers v. City of Kansas*, 108 Mo. 480, 18 S. W. 914; *Klatt v. City of Milwaukee*, 53 Wis. 196, 10 N. W. 162, 40 Am. Rep. 759; *Mullen v. Town of Rutland*, 55 Vt. 77; *Weirs v. Jones County*, 80 Iowa 351, 45 N. W. 8843; *Theissen v. City of Belle Plains*, 81 Iowa 120, 46 N. W. 854.

The after-discovered evidence relied on as justifying the setting aside of the verdict of the jury for the defendants at the first trial is set forth in the affidavit of one Nathaniel Moody (colored), and when analyzed the affidavit is found to consist of four parts. The first states that affiant saw plaintiff coming down Grace street toward Eighth and not seeing him "come out at Eighth," and of finding the plaintiff in the trench, etc. This is merely cumulative of the plaintiff's own story, which is contradicted in these particulars. The second part of the affi-

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davit tells of affiant going over to the place and being "positive that there were no barriers on the west side of the excavation," and gives as his opinion that there were "no lights sufficient to warn a person of danger." Similar expressions of opinion of the witness, Tabb, had been ruled out by the court at the trial, and even if such opinions could be accepted as proper evidence, that of the affiant Moody was merely cumulative and corroborative of the statements made by the plaintiff himself and by his witness Adams, and therefore has to yield to the established test, fully recognized by plaintiff's counsel in his brief, of cumulative and corroborative evidence. The third part of the affidavit only tells of the affiant, Moody, seeing "a man fixing the place up" a short time after the accident, and that "after the accident the place was barricaded and lighted," all of which was but cumulative and corroborative of what the plaintiff and his witnesses, Adams and Tabb, had testified to at the trial. And the fourth part of the affidavit merely tells of the affiant's visit to the plaintiff after the first trial when he told plaintiff what he knew of the case and declared his willingness to testify as to what he had stated to the plaintiff in that interview, all of which was immaterial and afforded no ground whatever upon which to rest the motion for a new trial because of after-discovered evidence.

The other affidavit offered in support of the motion to set aside the judgment and verdict at the first trial is that of counsel for the plaintiff, in the usual form, and to the effect that counsel knew nothing of what Nathaniel Woody would testify to until after the first trial, etc., and serves only to needlessly acquit counsel of neglect of duty to exercise diligence in preparing his client's case for trial.

Our own authorities for the rule with respect to motions for a new trial on the ground of newly discovered evidence are cited in the recent case of *Taliaferro v. Shepherd*, 107 Va. 56, 1 Va. App. 293, 57 S. E. 385, and need not be again cited here.

We are of opinion that the circuit court erred in setting aside

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the first verdict as being contrary to the law and the evidence, and that judgment, as well as the judgment for the plaintiff at the second trial, must be reversed and a judgment entered for the defendant city, in accordance with the verdict of the jury at the first trial.

*Reversed.*

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Syllabus.

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**Richmond.**

COLUMBIA AMUSEMENT CO. AND OTHERS V. PINE BEACH INVESTMENT CORPORATION.

March 11, 1909.

1. **APPEAL AND ERROR—Instructions—Objections Not Assigned.**—This court will not consider objections to instructions given by the trial court when neither the petition for the writ of error nor the brief of counsel point out in what respect the instructions are erroneous.
2. **INJUNCTION BOND—Measure of Damages.**—Where a lessor who has leased premises to a tenant for the sale of liquor and for no other purpose whatever, is enjoined from permitting liquor to be sold on the leased premises by a third person, who gives an injunction bond with condition to pay all costs and damages that may be incurred by reason of the injunction, if the same should be dissolved, the obligors in the injunction bond are liable to the lessor, upon dissolution of the injunction, for the rent he should have received during the time the injunction was in force. He could not collect the rent of the tenant, and the loss is properly placed on the party ultimately responsible for the injury.
3. **INJUNCTION BOND—Temporary Injunction—Damages Sustained After Injunction is Made Permanent.**—In an action upon an injunction bond, given at the time a temporary injunction is granted, and "conditioned to pay all such costs as may be awarded against said plaintiff, and all such damages as shall be incurred in case the said injunction be dissolved," the obligors are liable for whatever costs and damages were incurred and suffered from the time the injunction was granted until it was finally dissolved after an appeal, and their liability is not limited to the time when the temporary injunction was made permanent by the trial court.
4. **INJUNCTION ORDER—"Bond Conditioned According to Law"—Effect.**—Code, Section 3442.—An injunction order requiring an injunction bond to be given with condition "according to law" is sufficient

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authority to the clerk to make the condition "to answer all costs and damages that may be incurred by reason of the suing out the injunction in case the same shall be dissolved," and is a substantial compliance with the provisions of section 3442 of the Code directing the court to prescribe the condition of the bond. It is the usual, if not almost the universal, practice of the courts of original jurisdiction to prescribe the conditions of such bonds in this manner when the circumstances are not such as to render special conditions necessary.

5. **ESTOPPEL—Obligor in Injunction Bond.**—A plaintiff who has executed an injunction bond, and has obtained and acted upon the injunction is estopped to deny his liability upon the bond.
6. **APPEAL AND ERROR—Correcting Excessive Judgment.**—The judgment of a trial court will not be abated by this court as excessive, unless the record clearly establishes such excess.

Error to a judgment of the Court of Law and Chancery of the city of Norfolk in an action of debt. Judgment for the plaintiff. Defendants assign error.

*Affirmed.*

The opinion states the case.

*R. Randolph Hicks*, for the plaintiffs in error.

*Sidney Teiser* and *E. R. F. Wells*, for the defendant in error.

KEITH, P., delivered the opinion of the court.

The Columbia Amusement Company obtained from the Circuit Court of Norfolk county an injunction against the Pine Beach Investment Corporation to restrain it and others from operating a bar room for the sale of intoxicating liquors at its amusement resort at Pine Beach, in Norfolk county. To render the injunction operative, the plaintiffs executed a bond, the condition of which was that "whereas, the above bound the Columbia Amusement Company on its bill in chancery against the Pine Beach Investment Corporation, *et al.*, addressed to the

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judge of the Circuit Court of the county of Norfolk, has obtained from the said court a decree reinstating a certain injunction granted by said court in said cause on the 29th day of June, 1906, until the further order of the court; and, whereas, it is provided by the order of said judge awarding the said injunction that the plaintiff shall not have the benefit thereof until it, or some one for it, shall enter into a bond, with good security, in the clerk's office of said court, payable to the Commonwealth of Virginia, in the penalty of five thousand dollars, and conditioned to pay all such costs as may be awarded against the said plaintiff and all such damages as shall be incurred in case the said injunction be dissolved."

The circuit court entered a decree perpetuating this injunction, from which an appeal was taken to this court, which entered an order reversing the circuit court, dissolving the injunction and dismissing the bill. *Pine Beach Co. v. Columbia Co.*, 106 Va. 810, 56 S. E. 822. Thereupon, the Pine Beach Company brought an action of debt upon the injunction bond against the Columbia Amusement Company and its surety, which resulted in a judgment for the plaintiff, to which the defendants obtained a writ of error.

The first error assigned is to the giving of two instructions at the instance of the plaintiff, which are as follows:

1. "The court instructs the jury, that if they believe from the evidence that the defendants executed the bond now sued on and have failed to perform its conditions, then the plaintiff is entitled to recover from the defendants the damages, if any, which it has suffered by reason of the reinstatement of the injunction whereby the plaintiff and O'Connor & Barr, its lessees, were enjoined from opening or operating a hotel or bar-room for the sale of intoxicating liquors on its premises at Pine Beach, they must find for the plaintiff."

2. "If the jury find for the plaintiff, they shall assess its damages at the amount of rent lost on account of the reinstatement of the injunction, that is to say, (1) the loss of that por-

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tion of the definite rent reserved for the liquor privileges in the lease between the plaintiff and Barr & O'Connor, which would have been due and payable during the time the injunction was effective, viz., from July 18, 1906, to March 27, 1907, with interest thereon for the average time."

As neither the petition nor brief of plaintiffs in error points out in what respect the first instruction is erroneous, this assignment will not be further considered.

The errors assigned with respect to instruction No. 2 are, that inasmuch as Barr & O'Connor retained possession of the premises and of the bar-room during all of this period, they remained liable for the rent, as there was no injunction against the use of the premises for any other purpose save as a bar-room; and that any damages sustained by reason of the fact that no intoxicating liquors could be sold, were damages sustained, not by the Pine Beach Investment Corporation, but by Barr & O'Connor, who were liable to the Pine Beach Investment Corporation for the full amount of the rent; and that, therefore, the instruction of the court was erroneous.

It was provided in the sub-lease from the Pine Beach Investment Corporation to Barr & O'Connor that the said premises were "to be used by said lessees as a place for the dispensing or sale of spiritous and malt liquors by retail and for any other use usually accompanying and attendant upon such business, but for no other purpose or purposes whatsoever."

It seems clear, therefore, that the Columbia Amusement Company obtaining the injunction which prevented Barr & O'Connor from selling liquor on the leased premises, prevented them from enjoying the only privilege to which they were entitled under the sub-lease, and they were powerless to use the premises for any other purpose. Under the facts shown in evidence, the Pine Beach Investment Corporation could not have recovered from Barr & O'Connor during the time the injunction was in force, under well recognized principles of law, and the Pine Beach Investment Corporation was in conse-

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quence injured to the extent that its right to recover rent was impaired by the act of the Columbia Amusement Company. We think, therefore, that the Columbia Amusement Company, having improperly interefered and obtained an injunction to which it was not entitled, became responsible for whatever damages might be sustained, and that the court was right in directing that it should be borne by the party ultimately responsible for the injury.

The second assignment of error to this instruction is that it told the jury that damages might be recovered for the loss of rent from the period in which the temporary injunction was made permanent until the final reversal by this court. It is submitted that the only bond required was the bond covering damages during the time in which the temporary injunction was in force, and that when the temporary injunction was made permanent it was merged in the permanent injunction; and that no recovery can be had on this bond for any damages which were sustained between the date of the permanent injunction and its final dissolution.

This seems to be a very narrow interpretation of the injunction bond. By its terms, the obligors therein became responsible to pay all such costs as may be awarded against the said plaintiff and all such damages as shall be incurred in case the said injunction be dissolved." It specifically embraces all costs and all damages.

The circuit court had required, as a condition to granting the relief which the Columbia Amusement Company prayed for, that it should execute a bond; upon the faith of that bond the injunction was granted; and by the decree of the circuit court, the injunction so granted was perpetuated and remained in force until dissolved by the decree of this court. Whatever costs and damages were incurred and suffered from the time the injunction was granted until its dissolution seem to be plainly within the terms of the injunction bond, and any other interpretation or construction would fall short of securing to a



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party who had been hindered and restrained by injunction at the suit of his adversary compensation adequate to the injury suffered. We are of opinion that this assignment of error cannot be maintained.

The third error assigned is that the court improperly allowed the defendant to introduce the injunction obligation above referred to. The objection urged under this assignment is that section 3442 of the Code provides, that an injunction, except in specified cases, "shall not take effect until bond be given in such penalty as the court, or judge, awarding it may direct, with condition as to the court shall seem just and proper in the case;" the contention being, that it is an essential requisite to the validity of the injunction bond, that the condition shall be prescribed by the court, while in this case the order recites that the injunction shall not take effect until the plaintiff, or some one for it shall have executed a bond in a prescribed penalty, and conditioned "according to law."

The course pursued in this case is, we believe, in accordance with the general, if not with the almost universal, practice in the courts of original jurisdiction in granting injunctions. When the court directs that a bond be executed conditioned "according to law," it has in its mind in the vast majority of instances just such a bond as was executed in this case—a bond to answer all costs and damages that may be incurred by reason of suing out the injunction in case the same shall be dissolved. It sometimes happens from the peculiar nature of the case that it is proper to prescribe a special condition to meet the particular emergency; but in the great majority of instances the form adopted in this case is sufficient to meet the situation, and the judge who directs in his order that a bond shall be executed, conditioned according to law, or as the law directs, or some such equivalent expression, has in mind and in effect prescribed a bond in the terms here used as being just and proper in all save exceptional instances, where the rights and interests of the parties, owing to some fact or circumstances which may dif-

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ferentiate the case from the general rule, may require special conditions.

But if the position of the plaintiff in error were sustained, it would not aid him, because, having executed the bond, and having obtained and acted upon the injunction, he would be estopped to deny his liability upon this bond.

In *Harman v. Howe*, 27 Gratt. 676, an injunction was granted, and the decree provided for a bond "on the usual terms," without fixing its penalty. The bond was given in a penalty about double the amount of the judgment enjoined. In an action on the bond, the defense was made that the decree was not in compliance with the statute; but Judge Moncure, speaking for the court, said: "Without deciding that question, we are of opinion that the obligors to the bond are estopped from denying that the penalty of the bond conformed to the direction of the judge who awarded the injunction."

Judge Fauntleroy says, in *Wray v. Davenport*, 79 Va. 26: "It is too late now, and in this court, for the appellants to claim that the injunction sued out by them, and maintained and insisted upon by them for three years and a half, was improvidently granted, and was in fact no injunction. They prayed for and obtained it. They raised no objection to it or its requirements. They gave the bond. They reaped the benefit of all the proceedings. They took the property levied on, and may have used it up, so that no vestige of it remains. They are estopped to deny that the bond was proper in form or substance. They took the injunction, and they cannot now disclaim their bond."

In *Blankenship v. Ely*, 98 Va. 359, 36 S. E. 484, it is held, that "a bond executed pursuant to an order made in a chancery suit requiring its execution as a condition precedent to the enjoyment of certain rights, does not derive its efficacy from the order. The liability of the obligors is determined by the bond alone and not by the order. The obligors are estopped to deny the recitals of the bond, even if they were in conflict with the record."

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Plaintiffs in error claim that the amount of the recovery is somewhat in excess of what it should be, but we do not think their claim in this respect is so clearly established by anything in the record as to justify us in making an abatement. *McIntyre v. Smith*, 108 Va. 736, 62 S. E. 930, 2 Va. App. 601.

We are of opinion that the judgment should be affirmed.

*Affirmed.*

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Syllabus.

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**Richmond.**

**VIRGINIA CEDAR WORKS v. DALEA.**

March 11, 1909.

Absent, Keith, P., and Cardwell, J.

1. **PLEADING—Declaration—Several Counts—Demurrer to Declaration and to Each Count—Defective Counts Ignored—Appeal and Error.**—Generally if a declaration in tort contains more than one count, some of which are good and others bad, and there is a demurrer to the whole declaration and each count thereof, it should be sustained as to the bad counts, else a general verdict and judgment for the plaintiff will, as a rule, be set aside, as the verdict may have been founded on the faulty count. But where the court is satisfied that the defendant has not been prejudiced by the faulty count, the verdict ought not, for that cause only, to be set aside. So where it is manifest that the trial was had on a particular count and that is good, the appellate court will not concern itself with the insufficiency of other counts.
2. **PLEADING—Declaration in Tort—Sufficiency.**—It has never been the purpose of this court to introduce innovations in pleading in negligence cases, or to subject the plaintiff to unreasonable requirements in setting out the cause of his action. All that is necessary is for the pleader to set forth the facts which constitute the cause of action in such manner that they may be understood by the party who is to answer them, the jury who are to ascertain the truth of the allegations, and by the court which is to give judgment.
3. **PLEADING—Declaration in Tort—Sufficiency—Case at Bar.**—A count in tort which sets forth with a reasonable certainty the facts that show that the casualty complained of was proximately due to the defendant's negligence in ordering an inexperienced servant, of whose lack of skill it had knowledge, without instruction and assistance, to operate a dangerous machine, which duty was ordinarily performed by a sawyer and helper, is suf-

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ficient. It connects the defendant's negligence with the injury complained of, and sufficiently warns the defendant of the case he is to meet.

4. INSTRUCTIONS—*Interpretation by Counsel—Request for Construction by Court—Writing Required.*—If, pending argument of a case before the jury, counsel object to the interpretation placed by opposing counsel on an instruction which has been given, and requests an instruction from the court construing the language used, it is not unreasonable for the court to require the counsel making the objection to reduce to writing the qualifying or explaining instruction desired, and such is the usual and better practice.
5. NEW TRIAL—*Allegation and Proof—Case at Bar.*—The evidence in the case at bar, viewed from the standpoint of a demurrer to the evidence, establishes the allegation of the declaration that the proximate cause of the plaintiff's injury was the failure of the defendant to provide a sufficient number of competent servants to do the work required.
6. NEW TRIAL—*After Discovered Evidence—Requisites.*—In order to warrant a new trial for after discovered evidence, the evidence must have been discovered since the trial. It must be evidence that could not have been discovered before the trial by the exercise of reasonable diligence. It must be material in its object and such as ought, on another trial, to produce an opposite result on the merits. It must not be merely cumulative, corroborative or collateral.

Error to a judgment of the Circuit Court of Norfolk county in an action of trespass on the case. Judgment for the plaintiff. Defendant assigns error.

*Affirmed.*

The opinion states the case.

*Loyall, Taylor & White*, for the plaintiff in error.

*J. T. Lawless*, for the defendant in error.

WHITTLE, J., delivered the opinion of the court.

The object of this writ of error is to review a judgment obtained by the defendant in error, Juan Dalea, against the

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plaintiff in error, the Virginia Cedar Works, in an action to recover damages for personal injuries imputed to the negligence of the defendant.

The first assignment of error relates to the action of the court in overruling demurrers to the original and amended declarations.

The court overruled a demurrer to the original declaration and to each of the four counts thereof, and, thereupon, the plaintiff, by leave of the court, amended his declaration by filing a fifth count, the demurrer to which was likewise overruled.

It is a general rule of practice, that "if a declaration in tort contains two or more counts, some of which are good and others bad, and there is a demurrer to the whole declaration and each count thereof, it should be sustained as to the bad counts, else a general verdict and judgment for the plaintiff will, as a rule, be set aside." *Norfolk & Western Ry. Co. v. Stegall*, 105 Va. 338, 54 S. E. 19.

The reason for the rule is that the verdict may have been founded upon an immaterial or faulty count. But where the court is satisfied that the defendant has not been prejudiced by reason of such faulty count, the verdict ought not, for that cause only, to be set aside. Thus, in the present instance, it is apparent that the trial was had upon the case made by the fifth count; and, therefore, if that count be sufficient to maintain the action, no injustice will be done by relaxing the stringency of the general rule; nor need we concern ourselves to consider the alleged insufficiency of the remaining counts. *Standard Oil Co. v. Wakefield*, 102 Va. 824, 834, 47 S. E. 830, 66 L. R. A. 792; *Virginia, &c. Wheel Co. v. Harris*, 103 Va. 708, 49 S. E. 991.

We shall, accordingly, confine our inquiry to the sufficiency of the fifth count, the essential averments of which are as follows: That the defendant was carrying on the business of manufacturing buckets, barrels and like products, and employed

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in connection with its business revolving circular saws and other dangerous machinery; that the plaintiff was hired by the defendant as a common laborer, to keep its yard clear of trash, chips and other *debris* incident to the operation of the plant; that there was in use in the factory at the time of the accident a dangerous machine, known as a bottom machine, to which was attached a large circular saw; that at least two servants were necessary to operate the machine and handle the logs, chains, ropes, belts and other appliances, and it could not be operated, fed and managed by a less number of servants without greatly increasing the risk and danger of the operator; and that it was the custom of the defendant not to employ fewer than two of its servants in such operation; that it was the duty of the defendant to engage a sufficient number of servants to discharge that service with reasonable safety to themselves, and not to assign the plaintiff to such position of danger, and transfer him to essentially new duties and responsibilities and expose him to hazards different from those incident to his original contract of employment, and for the performance of which he was unfitted by reason of lack of experience and skill. Nevertheless, the defendant did not observe its duty in that regard, and although the plaintiff was hired as a common laborer, as before mentioned, the defendant, with knowledge of the increased danger and his lack of experience and skill, without necessary instruction, negligently required the plaintiff to operate the dangerous machine and saw without assistance. That while the plaintiff, in the exercise of reasonable care and without fault on his part, singly and alone, and in obedience to the master's order, was preparing and adjusting a log of wood upon the table used in connection with the rapidly revolving saw, to be cut into designated pieces, his right hand was borne down and forced into sudden contact with the saw, and so injured and mangled that it became necessary to amputate his arm between the wrist and elbow. The count also contains the averment that the increased risk was not so dangerous that a prudent man would have refused to incur it.

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It is objected that the count shows no causal connection between the alleged grounds of negligence and the accident; and, moreover, that it does not forewarn the defendant of the case it is required to meet.

The count is not amenable to criticism on either ground. It sets forth with reasonable certainty facts that show that the casualty was proximately due to the defendant's negligence in ordering an inexperienced servant, of whose lack of skill it had knowledge, without instruction and without assistance, to operate a dangerous machine, which duty was ordinarily performed by a sawyer and helper.

It has never been the purpose of this court to introduce innovations in pleading in negligence cases, or to subject the plaintiff to unreasonable requirements in setting out his cause of action. All that is necessary is for the pleader "to set forth the facts which constitute the cause of action, so that they may be understood by the party who is to answer them, by the jury who are to ascertain the truth of the allegations, and by the court who is to give judgment." Surely, this oft-repeated and reasonable rule of the common law (taken literally from 1 Chitty's Pleading—9th Am. ed.—232-3), while not unduly burdensome on the plaintiff, is quite sufficient to advise the defendant of the case he is called upon to defend. This subject has been so recently and so repeatedly discussed by this court, that it demands neither elaboration nor citation of authority.

The next assignment of error arises in connection with the plaintiff's instruction No. 1.

That instruction told the jury that it was the duty of the defendant to use reasonable care not to expose its servant to risks beyond those incident to the service at the time of the contract of employment. And if they believed from the evidence that while the plaintiff was performing his duties with ordinary care, the defendant violated its duty in the particular indicated, and that such breach of duty on its part was the



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proximate cause of the injury, the defendant is liable in damages; unless the jury should further believe from the evidence that the risk to which the servant was exposed was so glaring, constant and imminent that an ordinarily prudent man would have refused to incur it.

In interpreting that instruction, the plaintiff's counsel argued that, although the plaintiff assumed the risks incident to his employment as a laborer in the yard, he did not assume the risk of operating without assistance the machine by which he was injured, unless the risk was of such a character that an ordinarily prudent man ought to have declined to assume it. Thereupon, counsel for the defendant objected to that line of argument, and requested the court to instruct the jury verbally as to the meaning of the instruction; to which request the court replied, that counsel could give his interpretation of the instruction, but if he desired an instruction from the court construing the language used, he must reduce such instruction to writing.

The instruction in question was taken substantially from an instruction founded upon a similar state of facts approved in *Va. &c. Cement Co. v. Luck*, 103 Va. 427, 49 S. E. 577. See also *Goodman v. R. & D. Ry. Co.*, 81 Va. 586, and *R. & D. Ry. Co. v. Burnett*, 88 Va. 542-3, 14 S. E. 372.

The terms placed upon counsel by the court—namely, that if he wished an instruction qualifying or explaining an instruction already given, he must reduce it to writing—were not unreasonable, and are in accordance with the usual and better practice in such case.

The next assignment of error is to the alleged failure of the plaintiff to show that the absence of a sufficient number of servants was the proximate cause of the accident.

From the standpoint of a demurrer to the evidence, this assignment is without merit. Indeed, the following admission in the petition for the writ of error would seem to answer the contention: "In the case at bar, the plaintiff, as shown by the

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evidence, claimed that he should have had an assistant to help him lift extra heavy logs on the table connected with the circular saw, and because he did not have such an assistant and attempted to lift an extra heavy log he lost his balance and fell against the saw."

The plaintiff testified that two men were always necessary to lift the heavier logs. He was a young Italian laborer, who could not speak English, and understood very little of the language. Testifying through an interpreter as to how the accident happened, he said: "He was lifting up a piece that was extra heavy. He thought probably he could handle it. He had been doing it for a day, but in picking up this piece and putting it over, it over-balanced him, and bore him against the saw and cut his hand off."

This evidence establishes a state of facts which sufficiently shows the causal connection between the injury received and the failure of the defendant to provide the plaintiff with an assistant to help him feed and operate the machine. *Improvement Co. v. Smith's Admr.*, 85 Va. 306, 7 S. E. 365, 17 Am. St. Rep. 59; *Marshall v. Valley R. Co.*, 99 Va. 805-6, 34 S. E. 455; *Virginia, &c. Co. v. Tomlinson*, 104 Va. 249, 51 S. E. 362.

The remaining assignment of error concerns the action of the court in overruling the defendant's motion for a new trial, on the ground of after-discovered evidence.

The theory of the defendant as to the cause of the accident, as testified to by the foreman in charge of the saw-room, is that Dalea was at the rear side of the saw cleaning the trash away with a little stick, and as he turned around he threw his hand on the back of the saw and received the injury of which he complains. The after-discovered evidence is that of two of the hands in the factory. Neither saw the accident, but one of them claims to have seen the plaintiff immediately before it occurred scraping saw-dust from under the rear end of the saw; and the other states that he saw him immediately after the ac-

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cident standing at the rear end of the saw. The effect of this evidence, if true, is merely corroborative of the testimony of the foreman.

The rule governing the granting of new trials on the ground of after-discovered evidence is well settled, and is stated by Judge Cardwell, in *Norfolk v. Johnakin*, 94 Va. at page 290, 26 S. E. 832, as follows: "Motions for new trials are governed by the same rules in civil as in criminal cases, and the circumstances controlling the granting of new trials upon the ground of after-discovered evidence are summed up by this court in *Nicholas' case*, 91 Va. 753, 21 S. E. 368, thus:

"1st. The evidence must have been discovered since the trial.

"2d. It must be evidence that could not be discovered before the trial by the exercise of reasonable diligence.

"3d. It must be material in its object and such as ought, on another trial, to produce an opposite result on the merits.

"4th. It must not be merely cumulative, corroborative or collateral." Citing 4 Min. Inst. Pt. I, 758; *St. John's Ex'or v. Alderson*, 32 Gratt. 140, 143; *Wynn v. Newman's Admr.*, 75 Va. 817; *Whitehurst v. Com'th*, 79 Va. 556. See also *Taliferro v. Shephard*, 107 Va. 56, 57 S. E. 585, 1 Va. App. 293.

It does not appear that this evidence could not have been discovered before the trial by the exercise of reasonable diligence. Both affiants were employees of the defendant, and the simple inquiry as to what *they knew* of the accident (though neither saw it) would have elicited the desired information. Besides, the evidence is only cumulative and corroborative of the testimony of the foreman. So that in neither aspect do the affidavits measure up to the required standard.

Upon the whole case, we find no error in the judgment complained of, and it must be affirmed.

*Affirmed.*

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## Richmond.

## CHESAPEAKE AND OHIO RAILWAY CO. v. HUNTER.

March 11, 1909.

1. **PLEADING—Declaration—Negligence—How Charged.**—It is not sufficient for a declaration to allege negligence in a general way (for to do so is only to state the pleader's conclusions of law from undisclosed facts), but it must aver the act of negligence relied on with reasonable certainty, and show that such act constitutes the efficient and proximate cause of the injury. Otherwise, no traversable issue is tendered, and the court cannot determine, as a matter of law, whether the declaration states a case of actionable negligence, and the defendant is not informed of the case he is called upon to defend. All that is required is that the declaration shall contain a concise statement of the material facts on which a recovery is demanded, and not bare conclusions from undisclosed facts. The evidence, of course, need not be pleaded, but the facts relied on as furnishing a cause of action should be sufficiently set forth to apprise the defendant of the ground of complaint.

Error to a judgment of the Circuit Court of Goochland county in an action of trespass on the case. Judgment for the plaintiff. Defendant assigns error.

*Reversed.*

The opinion states the case.

*D. H. & Walter Leake*, for the plaintiff in error.

*James C. Page* and *Jas. Alston Cabell*, for the defendant in error.

WHITTLE, J., delivered the opinion of the court.

This action is brought by the defendant in error, George Hunter, to recover damages for personal injuries received

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while in the service of the plaintiff in error, the Chesapeake and Ohio Railway Company.

The only assignment of error which demands our attention relates to the action of the court in overruling the demurrer to the declaration.

The declaration contains three counts, the *gravamen* of each of which is as follows:

1. That the defendant was the owner of an iron or steel rail of great weight, which was lying along its roadbed, and under the control of certain of its agents or servants; that it was the duty of the defendant, by its agents and servants, so to control, manage or handle the rail as not to carelessly and negligently injure the plaintiff, when not guilty of any negligence on his part. Yet the defendant, by its agents and servants, conducted itself so carelessly and negligently in the management, control and handling of the rail as to allow it to fall upon and strike the plaintiff, inflicting the injuries of which he complains.

2. That on the occasion of the accident the plaintiff was employed by the defendant to help its other employees to handle and move the rail in question; and it was the duty of the defendant to exercise ordinary care in selecting competent servants, especially a competent foreman, to handle and move the rail. Yet the defendant negligently failed to exercise such care in selecting a competent foreman, and in consequence of the negligent, unskilful and wrongful orders and directions given by such incompetent foreman, the rail was allowed to fall upon and strike the plaintiff, inflicting the injuries of which he complains; and

3. That the defendant's foreman, who had authority over the plaintiff, did not give the proper and necessary orders or directions about handling and moving the rail, but gave such negligent and reckless orders that the rail, which was being handled by the plaintiff with reasonable care, was untimely, carelessly and negligently thrown, and fell upon the plaintiff, inflicting the injuries of which he complains.

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The cardinal vice of all these counts is that, while they iterate and reiterate in varying phrase the charge of negligence against the defendant, they wholly omit to state the facts upon which the alleged negligence is predicated.

It is well settled that it is not sufficient for the declaration to allege negligence in a general way (for to do so is only to state the pleader's conclusions of law from undisclosed facts); but it must aver the act of negligence relied on with reasonable certainty, and show that such act constitutes the efficient and proximate cause of the injury. Otherwise, no traversable issue is tendered, and the court cannot determine, as a matter of law, whether the declaration states a case of actionable negligence, and the defendant is not advised of the case which he is called upon to defend. Our reports contain numerous illustrations of this principle.

Thus, in the recent case of *Lynchburg Traction & L. Co. v. Guill*, 107 Va. 86, 57 S. E. 644, 1 Va. App. 322, the court, speaking through the president, observes: "Negligence is a conclusion of law from facts sufficiently pleaded. The office of a declaration is to inform the defendant of the case which it has to meet, so that it may have a reasonable opportunity to prepare its defense. It is not enough to say that the plaintiff was injured and that the injury resulted from the careless and negligent conduct of the defendant, but the facts relied upon to establish the negligence for which the defendant is to be held liable must be stated with reasonable certainty."

Tested by that standard, the first count of the declaration is insufficient. It states no fact from which the existence of actionable negligence can be inferred, or which informs the defendant of what it is required to answer.

So, with the second count, it avers, by way of premise, the duty of the defendant to exercise ordinary care in selecting competent servants, and especially, a competent foreman, to handle and move the rail, and the breach of that duty. The pleader then proceeds to ascribe the accident to the negligent,

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unskilful and wrongful orders and directions given by the incompetent foreman, without any suggestion as to what orders and directions were given; thus again substituting a bare conclusion for the facts from which it is to be deduced.

The third count is amenable to the same objection.

In the case of *Newport News & Old Point Ry. & Elec. Co. v. Nicolopoulos*, ante, p. 165, 63 S. E. 443, the court, speaking through Buchanan, J., says: "The third count does not aver in what particular the defendant failed to perform its duty. It charges generally that the defendant negligently ran its car into the plaintiff's wagon, whilst he was attempting to cross its track. As a count in trespass on the case, this count is not good under our decisions. \* \* \* Whether *an action based upon negligence*, be in case or trespass, the same reason exists why the acts of negligence relied on as a basis of recovery should be stated in the one case as in the other. The object of a declaration is to apprise the adverse party of the ground of complaint."

This court has not laid down, nor does it propose to establish any unreasonable rules with regard to particularity of averment in declarations in personal injury cases. All that the rule requires is, that the declaration shall contain a concise statement of the material facts on which a recovery is demanded. Of course, the evidence relied on to sustain the averments of the declaration need not be pleaded. Surely a rule so essential for the enlightenment of the court and the defendant imposes no unreasonable burden upon the plaintiff. Indeed, it is hard to conceive how any intelligent system of pleading could require less.

It is well known to the profession, that the practice under the liberal doctrine of some of the earlier cases had become so lax that in many instances declarations contained mere legal inferences upon the essential element of negligence, based upon no fact, and defendants were relegated wholly to the field of speculation as to the real grounds of their supposed liability.

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The decision in *Hortenstein v. Va.-Car. Ry. Co.*, 102 Va. 914, 47 S. E. 996, was intended to correct the mischief which flowed from that practice.

In that case it is said by Judge Cardwell: "The court, upon mature consideration, has reached the conclusion that, in actions for a tort, the declaration must state sufficient facts to enable the court to say upon demurrer, whether, if the facts stated are proved, the plaintiff would be entitled to recover."

See also *Blackwood Coal & Coke Co. v. James' Admr.*, 107 Va. 656, 60 S. E. 90, 1 Va. App. 732; and *Virginia Cedar Works v. Dalea*, ante, p. 333, 64 S. E. 41.

For the error of the court in overruling the demurrer to the declaration, the judgment must be reversed, the verdict of the jury set aside, and the case remanded to the circuit court, with leave to the plaintiff, if so advised, to amend his declaration, and for further proceedings.

*Reversed.*



Syllabus.

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**Richmond.**

COMMONWEALTH AND OTHERS v. SCHOOL BOARD OF THE CITY  
OF NORFOLK AND OTHERS.

March 11, 1909.

Absent, Keith, P.

1. STATE BOARD OF EDUCATION—*Selection of School Furniture—Constitutional Law.*—Sub-section six of section 1433 of the Code, as amended by an act approved March 15, 1906, confers the power upon, and makes it the duty of, the State Board of Education to select the school furniture for use in all the public schools of the State, and is a valid enactment. There is nothing in section 136 or any other section of the Constitution of this State which, expressly or by necessary implication, prohibits the General Assembly from conferring such power on the State Board of Education.
2. CONSTITUTIONAL LAW—*Validity of Statutes—Doubtful Acts.*—Courts can only declare an act of the General Assembly unconstitutional when such act clearly and plainly violates the Constitution in such a manner as to leave no doubt or hesitation in the minds of the court.
3. STATUTES—*Constructions—State Board of Education "To Select" School Furniture—City Boards "To Provide."*—All statutes *in pari materia* should be read and construed together as if they formed parts of the same statute, and were enacted at the same time; and where there is a discrepancy or disagreement between them, their different provisions, as far as possible, should be reconciled and such interpretation given as that all may stand together. Applying this rule of interpretation to sub-section six of section 1433 of the Code, as amended by an act approved March 15, 1906, directing the State Board of Education "to select" school furniture for all the public schools of the State, and sub-section ten of section 1538 of the Code, as amended by an act approved March 17, 1906, directing city school boards "to provide" suitable school furniture for their schools, the two acts are not necessarily in conflict, but may stand together. The

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terms "to select" and "to provide" are not synonymous, and it is not to be presumed that the General Assembly intended, by the latter act, to take away from the State Board of Education the power conferred upon it by the act approved only two days previously. The power conferred on the State Board is clear and explicit, and should not be taken away by any language or provision in the statutes less clear and explicit than that by which it was conferred. Looking to all the provisions of the Constitution and statutes on the subject, it appears that the power to select furniture for all the public schools of the State, including those in cities, was clearly vested in the State Board of Education, by a valid act of assembly, and has not been taken away from it by any subsequent act.

Appeal from a decree of the Court of Law and Chancery of the city of Norfolk. Decree for the defendants. Complainants appeal.

*Reversed.*

The opinion states the case.

*Attorney General Wm. A. Anderson and W. W. Old & Son,*  
for the appellants.

*J. F. Duncan, D. Tucker Brooke and Tazewell Taylor,* for  
the appellees.

BUCHANAN, J., delivered the opinion of the court.

The object of this suit was to enjoin and restrain the school board of the city of Norfolk from carrying out a contract with the A. H. Andrews Company, which it had attempted to make for the delivery by that company of certain school furniture for use in the public schools of the city of Norfolk.

Prior to the act of assembly approved March 15, 1906 (Ch. 248, Acts 1906, p. 432), the school boards in the counties and cities of the Commonwealth were clothed with power to select school furniture for the use of the public schools in their respective jurisdictions. Code, sec. 1466, sub-sections 9 and 11; sec. 1538, sub-sections 10 and 11.

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By the act approved March 15, 1906, section 1433 of the Code, which defines the powers and duties of the State board of education, was amended. The sixth sub-section of that section, as amended, provides, that the State board of education shall have the power, and it shall be its duty, "to select text-books, school furniture, and educational appliances for use in the public schools of the State of Virginia, exercising such discretion as it may see fit in the selection of books suitable for the schools in the cities and counties, respectively, subject to the conditions and restrictions hereinafter set forth; but no text-books which may hereafter be adopted for use in any public free school in the State of Virginia shall be changed or substituted until the same shall have been used for a period of not less than four years."

That this sub-section, as amended, conferred the power upon and made it the duty of the State board of education to select school furniture for use in all the public schools of the State, is clear, unless it be, as contended by the counsel for the school board of the city of Norfolk, that the General Assembly is prohibited from conferring that power upon the State Board of Education.

Section 136 of the Constitution is relied on to sustain that contention. That section provides that "each county, city, town, if the same be a separate school district, and school district, is authorized to raise additional sums by a tax on property, not to exceed in the aggregate five mills on the dollar in any one year, to be apportioned and expended by the local school authorities of said counties, cities, towns and districts in establishing and maintaining such schools as in their judgment the public welfare may require \* \* \*." But there is nothing in that section or in any other provision of the constitution which, expressly or by necessary implication, prohibits the General Assembly from conferring upon the State board of education the power to select the school furniture in all the public schools.

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Courts can only declare any act of the General Assembly unconstitutional when such act clearly and plainly violates the Constitution in such a manner as to leave no doubt or hesitation in the mind of the court. *Commonwealth v. Moore, &c.*, 25 Gratt. 951, 953; *Button v. State Corp. Com.*, 105 Va. 634, 54 S. E. 769, and authorities cited.

Having reached the conclusion that the General Assembly had the right to confer upon the State board of education the power to select the school furniture for the public schools of the State, and that by the enactment of sub-section six of section 1433 of the Code, as amended by the act approved March 15, 1906, it had clearly done so, the school board of the city of Norfolk had no power to make the contract involved in this case unless the power to do so was conferred upon it by section 1538 of the Code, as amended and re-enacted by an act approved March 17, 1906 (Ch. 293, Acts 1906, pp. 513, 515).

By sub-section 10 of that section it is provided that the school board of a city shall have the power, and it shall be its duty, among other things, "to provide suitable school-houses, with proper furniture and appliances, and to care for, manage and control the school property of the city." This authority to "provide \* \* \* proper furniture" for the public schools of the city, it is contended conferred upon the city school board the power "to select" the school furniture, and as section 1538 was amended by an act approved two days after the act conferring the power of selecting school furniture upon the State board of education, it repealed that act so far as it applied to the public schools of the cities.

One of the well settled rules of construing statutes is that all statutes *in pari materia* should be read and construed together, as if they formed parts of the same statute, and were enacted at the same time; and where there is a discrepancy or disagreement among them, their different provisions, as far as possible, should be reconciled, and such interpretation given as that all may stand together. See *Dillard v. Thornton*, 29

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Gratt. 392, 396; *Postal Tel. &c. Co. v. N. & W. Ry. Co.*, 88 Va. 920, 925-6, 14 S. E. 803; *South & Western Ry. Co. v. Com'th*, 104 Va. 314, 321, 51 S. E. 824; *Chalmers v. Funk*, 76 Va. 717, 722; *Mitchell v. Witt*, 98 Va. 459, 461, 36 S. E. 528; Sedgwick on Constr. of Stat., 200-1; Black on Interp. of L., 60, 204.

This rule of construction applies with peculiar force in this case, because section 1522, which is found in the same chapter (67) of the Code as section 1538, provides, "that chapter sixty-six of the Code" (in which is found sec. 1433), "except as provided in this chapter, shall be applicable to such cities and towns in like manner as to the counties of the Commonwealth; and city and town school boards, officers, trustees, and teachers, as well as city and town treasurers, are charged with reference to the public free schools of such cities and towns with the duties, vested with the powers of, and subject to the limitations and penalties imposed upon, similar officers, boards, trustees, and treasurers in the counties by chapter sixty-six, unless otherwise provided."

The authority given the city school boards by sub-section 10 of sec. 1538, as amended, "to provide" school furniture, does not necessarily carry with it the right "to select" the school furniture which they were authorized to provide. If there had been no provision of law imposing the duty and conferring the power "to select" such furniture upon the State board of education, no doubt the city school boards would be construed to have the right of selection. But since that power had been expressly conferred upon the State board of education by an act approved on the 15th of March, it is not to be presumed that the General Assembly intended to take away that power by an act approved two days afterwards, defining the powers and duties of the school boards of the cities, unless the language relied on to show such change can receive no other reasonable construction.

The terms "to select" and "to provide" are not synonymous.

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**Opinion.**

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If it be held that the State board of education had the power "to select" the furniture to be used in the public schools, and that the city school board had the right "to furnish" or "supply" such furniture as had been "chosen" or "picked out" by the State board of education for use in the schools, a meaning will be placed upon the terms "to select" and "to provide" which is given them by the lexicographers and common usage. Not only is the court justified in so construing those terms under the rules of construction invoked, in order to harmonize the provisions of the sub-sections in which they are respectively found, and to give effect to both, but unless the term "to provide" be so construed, so far as it authorizes city school boards to provide proper educational "appliances" and "necessary text-books for indigent children" (sub-section 12 of sec. 1538), those provisions would be in violation of sub-section four of section 132 of the Constitution, which declares that the State board of education "shall select text-books and educational appliances for use in the public schools of the State."

It is true that sub-section nine of sec. 1466 provides that district school boards in the counties shall provide furniture for the schools, "in accordance with section 1433, sub-section six," and that there is no such provision in sub-section ten of sec. 1538. The insertion of those words in the one and their omission from the other does not affect the construction which should be given either when all the provisions of the Constitution and of chapters 66 and 67 of the Code as amended by the acts of March 15 and March 17, 1906, bearing upon the question are considered together; for it is clear, as it seems to us, that since the General Assembly, by the sixth sub-section of sec. 1433 of the Code as amended, expressly, by clear, explicit and unambiguous language, conferred the power and made it the duty of the State board of education "to select" the school furniture and appliances for all the public schools of the State, in the cities as well as in the counties, that power ought not to be construed to be taken away from the State board of educa-

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tion by any language or provision in chapters 66 or 67 of the Code, less clear, explicit and unambiguous than that by which that power was conferred.

We are of opinion, therefore, that the school board of the city of Norfolk had no power to make the contract whose validity is involved in this case.

It may be proper to say, that when that school board accepted the proposition of the A. H. Andrews Company to furnish the school furniture, the board did not know that the State board of education had selected the furniture to be used in the public schools of the State, and that in attempting to keep and perform the contract with that company the city school board was acting in good faith under the advice of its counsel, that it and not the State board of education had the power of selection. The action of the State board of education in making such selection was fully known, however, to the A. H. Andrews Company, and its conduct in attempting to make the contract with the school board of the city, under the facts disclosed by the record and not denied by it, was not characterized by good faith.

The decree appealed from, dissolving the injunction, must be reversed, and this court will enter such decree perpetuating the same as the trial court ought to have entered.

*Reversed.*

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Statement.

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**Richmond.**

CITY OF NORFOLK v. BOARD OF TRADE AND BUSINESS MEN'S  
ASSOCIATION, A CORPORATION, AND CITY OF NORFOLK v.  
VIRGINIA CLUB, A CORPORATION.

March 11, 1909.

1. **SOCIAL CLUBS—Exemption From Municipal Taxation—Power of Legislature to Exempt—Intoxicating Liquors—Licenses—Section 1042 of Code.**—The act of March 12, 1904 (Acts 1904, p. 214), granting to corporations organized and conducted as *bona fide* social clubs exemption from all taxation, State, municipal and county, except the license fee to the State required by said act is a valid exercise of the police power of the State, although it may abridge the police power of the subordinate divisions of the State. It is not special legislation within the meaning of the Constitution, as it is a general law applicable to the whole State; and, in so far as it conflicts with section 1042 of the Code, it must prevail as it was enacted subsequently to that section. The power of the legislature to enact laws on any and all subjects is unrestrained, unless prohibited by the Constitution and it may say what a city shall, and what it shall not, tax notwithstanding section 1042 of the Code. Under the express terms of said act, a city has no right to impose a license or tax on a *bona fide* social club organized under the act, and which has complied with its provision.

Error to a judgment of the Circuit Court of the city of Norfolk on an appeal from the police justice. Judgment for the defendant. Plaintiff assigns error.

*Affirmed.*

The opinion states the case.

*Jama F. Duncan*, for the plaintiff in error.



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*Thomas H. Willcox and Williams & Tunstall*, for defendants in error.

CARDWELL, J., delivered the opinion of the court.

The writs of error awarded in these two cases present the same question, the cases were submitted together for decision, and will be disposed of in this opinion.

Upon the agreed statement of facts filed in the record, defendants in error are each *bona fide* social clubs, by virtue of the laws of Virginia, chartered and organized prior to April 16, 1903. Each of them paid to the treasurer of the city of Norfolk, in due time, \$350.00 claimed against them, respectively, as all that was due for license taxes under the laws of Virginia for the year 1905. The city of Norfolk, by its ordinance, undertook to impose on behalf of the city an additional license tax of \$500, and defendants in error having failed to pay same, they were each adjudged by the police justice of the city to pay a fine of \$20 and costs; whereupon, an appeal was taken to the Circuit Court of the city of Norfolk, and upon the hearing, that court "being of the opinion that the act approved March 12, 1904—Acts 1904, p. 214—is an exercise of the police power of the Commonwealth, regulating social clubs and fixing conditions upon which they exist in this State, and restrains the city of Norfolk from imposing additional conditions," rendered its decision accordingly. In other words, the circuit court denied the right of the city to impose further taxes or license charges against defendants in error other than the sum of \$350 imposed by the State of Virginia, reversed the judgment of the police justice and dismissed each of these prosecutions.

The act of March 12, 1904, *supra*, so far as pertinent to these cases, is as follows: "Any corporation chartered and organized as a social club and paying the tax above described (the tax of \$350 in favor of the State) shall be entitled to distribute

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and dispense wines, ardent spirits, malt liquors or any mixture thereof, alcoholic bitters or bitters containing alcohol, or fruit preserved in ardent spirits, or malt liquors only, as the case may be, to and among its members without obtaining any license or paying any other or further tax, either State, municipal, or county, for the said privilege, than as above described; provided that such corporation is organized and conducted as a *bona fide* social club." And by a preceding section of the statute the exemption of all social clubs from being required to obtain any license or pay any other further tax, either State, municipal or county, for the privilege of being a social club, is restricted to *bona fide* social clubs chartered and organized prior to April 16, 1903.

By the agreed statement of facts it further appears, that all of the conditions are met entitling defendants in error to the exemption from further taxation by the State for the year 1905, and from municipal tax, for the privileges conferred by the statute; therefore, the sole question for our determination is the power of the legislature to pass the act in question. We are not required to determine whether or not there was a valid reason for the legislature to pass the act, but solely whether it had the power.

The power of the legislature to enact laws upon any and all subjects is unrestrained, unless prohibited by the Constitution. *Conk v. Skeen*, Judge, ante, p. 6, 63 S. E. 11, 2 Va. App. 732, 735.

There is nothing in the Constitution in express terms prohibiting the passage of the act of March 12, 1904, *supra*, as section 64 of the Constitution (forbidding the legislature to pass special laws in certain cases, among others, "grant to any private corporation, association or individual any special or exclusive right, privilege or immunity"), has no application here, the statute being a general law.

Nor is there any merit in the contention of plaintiff in error, the city of Norfolk, that section 1042 of the Code should over-

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ride the act now under consideration, because it is in general consonance with section 64 of the Constitution. The act under consideration, passed at a subsequent date to that of section 1042 of the Code conferring upon cities and towns authority to impose a license tax in addition to such tax as is imposed by the State in certain cases, being constitutional and valid, necessarily operates as a limitation upon the authority of the cities and towns of the Commonwealth, conferred by section 1042, to impose in addition to the State tax on any license a tax for the benefit of the city or town. The subsequent statute is but an amendment to the former, both being general laws, constitutional and valid.

There is no abridgement of the exercise of the police powers of the State by the statute of March 12, 1904, under consideration. On the contrary, the act is in the exercise of the State's police powers; and even if it does "cripple and abridge the police power of plaintiff in error," it is none the less within the power of the legislature to enact it, as the legislature has the power to say what the city shall tax and what it shall not tax, notwithstanding section 1042 of the Code, *supra*.

The statute under consideration, though incidentally referred to in *Phoebus v. Manhattan Club*, 105 Va. 144, 52 S. E. 839, was not involved so as to require an adjudication as to its validity or effect, and therefore the decision in that case has no bearing here.

We are of opinion that the judgment of the circuit court in these cases is without error and should, therefore, be affirmed.

*Affirmed.*

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Opinion.

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**Richmond.**

HATCHER v. RICHMOND AND CHESAPEAKE BAY RAILWAY CO.

March 11, 1909.

1. **BOUNDARIES—Descriptions—Party Walls—Courses and Distances—Monuments—Case at Bar.**—While courses and distances yield to monuments where there is a conflict, the evidence must show a conflict, and, in the absence of evidence, the presumption is that no such conflict exists. In the case at bar, it is held that, upon a proper construction of the conveyances, the true dividing line between the properties in controversy is the center line of the party wall between said properties, and that to the extent, if any, that the defendant's structures extend beyond the dividing line and upon the premises of the plaintiff the latter is entitled to recover, and that the jury should have been so instructed.

Error to a judgment of the Law and Equity Court of the city of Richmond in an action of ejectment. Judgment for the defendant. Plaintiff assigns error.

*Reversed.*

The facts sufficiently appear from the opinions of the court and of Keith, P.

*Hunsdon Cary*, for the plaintiff in error.

*Munford, Hunton, Williams & Anderson*, for the defendant in error.

KEITH, P.:

Hatcher brought an action of ejectment in the Law and Equity Court of the city of Richmond against the Richmond and Chesapeake Bay Railway Company, to recover a certain

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lot of land, with the two brick tenements, known as numbers 811½ and 813 west Leigh street thereon, it being the same lot of land which was conveyed to the plaintiff by Mary E. Rudder, by deed dated October 2, 1905.

The defendant pleaded not guilty. A jury was impaneled, who rendered a verdict in favor of the defendant, upon which the court entered judgment, and the plaintiff applied for a writ of error, which brings before us for review certain rulings of the trial court.

The evidence proves, or tends to prove, the following facts: William D. Gibson owned a lot of land in the city of Richmond, lying on the south side of Leigh street, between Gilmer and Graham streets. Some time prior to 1894 he built on said lots five brick tenement houses, known as Nos. 809, 809½, 811, 811½ and 813 west Leigh street. These houses were divided by party walls, and their back yards were separated by board fences, the lots running back to an alley in the rear. Gibson died seized of these tenement houses some time prior to 1905, and on August 24th of that year his executors and heirs at law conveyed two of said houses, known as Nos. 809 and 809½ west Leigh street, to F. Sitterding, whose deed was put to record November 6, 1905. Sitterding and wife conveyed the same lots to the Richmond and Chesapeake Bay Railway Company, the defendant in this action, and this deed went to record on the same day.

On August 25, 1905, the executors and heirs at law of William D. Gibson, deceased, conveyed houses and lots Nos. 811½ and 813 to Mary E. Rudder, and this deed was put to record on the 12th day of October, 1905. On October 2, 1905, Mary E. Rudder conveyed these houses and lots to Peter B. Hatcher, the plaintiff in this action, and his deed was put to record October 12, 1905.

Soon after the railroad company purchased these two tenement houses from Sitterding, it proceeded to tear them down, preparatory to building an elevated, reinforced concrete trestle

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work, upon which it might operate its trains in and out of the city of Richmond; its depot being situated on the north side of Broad street and south of the plaintiff's property herein mentioned, and about four blocks distant. After the railroad company had torn down the houses it placed on the lots four structures, known as bents, to support the trestle work as it passed in a northerly and southerly direction over the said lots. These bents, like the rest of the structure, are composed of reinforced concrete, resting on cement beds buried deep in the earth, and it is claimed that the supports to this structure stand upon a part of the lot No. 811½ west Leigh street, which is owned by Hatcher, and infringe upon his rights as the owner thereof.

The deed to Sitterding describes the property conveyed to him as follows: "All that certain lot of land, with two (2) brick tenements known as 809½ and 811 west Leigh street thereon, lying and being in the city of Richmond, Virginia, beginning at a point on the southern line of Leigh street one hundred and one (101') feet, eight inches (8'') west of Gilmer street: thence running westwardly along and fronting on the said southern line of Leigh street thirty-one feet (31') five inches (5'') and extending back southwardly from said front, between parallel lines, one hundred feet (100') to an alley, according to a survey and plat made by T. Crawford Redd & Brother July 14, 1905, attached to and made a part hereof, being a portion of the same property that was devised to the said parties of the first part by William D. Gibson by his will probated in the Richmond chancery court, January 24, 1894, and recorded in W. B. 5, page 437."

The deed to Mary E. Rudder, under which the plaintiff claims, describes the two brick tenements Nos. 811½ and 813 conveyed to her as follows: Beginning "at a point on the southern line of Leigh street one hundred and thirty-three (133') feet one (1'') inch west of Gilmer street: thence running westwardly along and fronting on the said southern line of Leigh street thirty (30') feet two (2'') inches and extending back

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southwardly from said front between parallel lines one hundred (100') feet to an alley, according to a survey and plat made by T. Crawford Redd & Brother, July 14, 1905, attached to and recorded with a deed from the said parties of the first part to F. Sitterding, dated August 24, 1905; being a portion of the same property that was devised to the said parties of the first part by William D. Gibson, by his will probated in the Richmond chancery court January 24, 1894, and recorded in W. B. 5, page 437."

The plaintiff, as a witness in his own behalf, testifying with respect to the structures and referring to the trestle work erected by the defendant company, says: "The first one" (that is, the first leg of the trestle), "right in front of the wall of the house, just before you get to the front corner, is 6 inches from the wall of my house, right at the ground. The one right at the middle of the house is ten inches from the wall of my house. The one then right behind, just as you pass the house, is four inches inside of the line of my house. Then the rear one, at the back part of my lot, is 21 inches inside of the line." It is obvious from Hatcher's entire evidence that when in his principal statement he speaks of the legs of the trestle being "6 inches from the wall of my house," another as being "10 inches from the wall of my house," and another as being "4 inches inside of the line of my house," that he is speaking of the party wall common to one of his houses, designated as 811½, and the house belonging to the defendant in error, known as 811, both situated up west Leigh street. The exact line between plaintiff in error and defendant in error is the median line of that wall, and if that wall be nine inches in thickness, one-half of it belongs to the plaintiff and one-half to the defendant, and the defendant, in going four inches within the outer line of that wall committed no trespass upon the property of the plaintiff.

In response to a question by a juror, the witness said that there were five columns between the corner of the house and the gate. By "columns" he refers to what are sometimes called

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"bents" and at other places "legs" of the trestle. This witness, in answer to other questions, said the partitions between the houses were of brick; that when the railroad company tore down its houses no part of his property was left open, and that he did not have to board it up in order to protect it; that the partition wall was of brick, but he could not tell whether they ran the long way or the short way—that is, whether the wall was nine inches or four inches in thickness. This question was then put to him: "If they ran the 9 inch way, the other party had the right to go 4½ inches under that wall? That is what I am trying to get at. A. I understand. Q. Now, do you remember whether they ran the 4 inch or 9 inch way? A. I do not know. Q. None of these bricks were pulled down so that your property was exposed to the weather? A. No."

The defendant's evidence is clear and explicit that the structure, including the legs or columns upon which the trestle rested, and its foundations, at no point and to no extent went beyond the lines called for in the deed from Sitterding. There is no evidence that the houses do not rest exactly upon the lines called for in the deed, and the only evidence of a trespass upon the part of the defendant is to be found in the plaintiff's statement that the leg of one of the trestles was four inches inside the line of his house; and upon cross-examination he admits that he is unable to say whether the partition wall is nine inches thick or four and a half inches thick. If it was nine inches thick, the defendant had a right to do what he said the defendant did, and go under the wall of the house to the extent of four inches, for to that extent the party wall was the property of the defendant.

Such being the tendency of the evidence, the court instructed the jury as follows:

"The court instructs the jury, that the defendant, the Richmond and Chesapeake Bay Railway Co., had the right to construct its works on any portion of the property within the limits as shown by the plat or map made by T. Crawford Redd &



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Brother, dated July 14, 1905, and which was a part of the deed from Gibson's executors and others to Fritz Sitterding; and that if said lines included any portion of the walls of the house alleged to be owned by the plaintiff, or any portion of the yard enclosed by the fence, as alleged, the said defendant had a right to occupy the land under that portion of the yard, and also under any portion of its building walls so situated. And the court further instructs the jury, that if they believe from the evidence that the defendant company's works, including foundation and superstructure, were all located within the outer lines of lots 809½ and 811, as shown by the plat or survey made by T. Crawford Redd & Bro., attached to said deed to Fritz Sitterding, then they must find for the defendant. But if the jury believe that the company's works, including foundation or superstructure, extended beyond the outer line of lots 809½ and 811, in or upon the lot of the plaintiff 811½ (the plat of T. Crawford Redd & Bro. as above set forth showing the lines), then the jury should find for the plaintiff the portion of his lot so taken, if any, by the said foundation or superstructure."

This instruction, it is claimed, is erroneous.

The particular error relied upon is that it tells the jury that the railroad company had a right to construct its works on any portion of the property within the lines as shown by the plat made by T. Crawford Redd and Brother "and that if said lines included any portion of the walls of the house alleged to be owned by the plaintiff, or any portion of the yard enclosed by the fence, as alleged, the said defendant had a right to occupy the land under that portion of the yard, and also under any portion of its building walls so situated."

The contention on the part of plaintiff in error is that courses and distances must yield to monuments, and that it was error to tell the jury that the defendant had a right to erect its structure anywhere within the lines called for by its deed, because if those lines invaded the lots owned by plaintiff upon which houses were erected, the defendant's lines must yield to the plaintiff's fixed monuments.

## Opinion.

That courses yield to fixed monuments is true; but the question only arises where the evidence discloses a conflict in the description between the monuments and the courses and distances.

"If there is a conflict between them, the courses and distances given in the description must yield to the monuments." Devlin on Deeds, sec. 1029.

"It is a general principle," says Chief Justice Marshall, "that the course and distance must yield to natural objects called for in the patent. All lands are supposed to be actually surveyed, and the intention of the grant is to convey the land according to that actual survey; consequently, if marked trees and marked corners be found conformably to the calls of the patent, or mountains, or any other natural objects, distances must be lengthened or shortened and courses varied, so as to conform to those objects. The reason of the rule is that it is the intention of the grant to convey the land actually surveyed, and mistakes in courses and distances are more probable and more frequent than in marked trees, mountains, rivers, or other natural objects capable of being clearly designated and accurately described." *McIver's Lessee v. Walker*, 9 Cranch, 173, 3 L. Ed. 694.

See also *Adair v. White*, 85 Cal. 313, 24 Pac. 663; *Crampton v. Prince*, 83 Ala. 246, 3 South. 519, 3 Am. St. Rep. 718; *Scott v. Pettigrew*, 72 Texas 321, 12 S. W. 161; *Redmond v. Stepp*, 100 N. C. 212, 6 S. E. 727; *Bloom v. Ferguson*, 128 Pa. St. 362, 18 Atl. 488.

But while courses and distances yield to monuments, where there is a conflict, the evidence must show a conflict, and in the absence of evidence the presumption is that no such conflict exists.

"There is a presumption that monuments, corners and lines are where they are called, and the burden of proof is upon him who would locate them at a different place. The surveyor is presumed to have done his duty in every respect, and the burden

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of proof is upon the party disputing that his work was rightly done. When monuments can be identified there is a conclusive presumption that the lines are where they indicate. When the calls of the survey cannot be reconciled, their probative force is presumed to be in the following order of importance, to-wit: Natural objects, artificial marks, adjacent boundaries, courses, distances, and quantity. But all calls are evidence to aid in locating the survey upon the ground, and there is no inflexible rule as to their relative importance." 2 Ency. Ev., pp. 710-11-12.

In this case there is not a scintilla of evidence to show that the houses are not built where the courses and distances indicate that they should have been built. So far as the evidence discloses, the houses rest line for line upon the calls in the deed, and there is no discrepancy or conflict between the monuments and the calls in the deed, and therefore there is no place for presumptions as to the relative weight to be attributed to monuments, courses and distances, as no conflict is shown to exist.

Instructions are to be read and construed in the light of the evidence to which they apply. There is no evidence of trespass in this case, except the declaration of the plaintiff that the structure of the defendant was four inches under the walls of his house; and upon cross-examination he was unable to say whether the partition wall was a nine inch wall or a four and a half inch wall, and frankly admitted his ignorance. If it was a nine inch wall, the defendant was within its rights. It was for the plaintiff to prove his case, and he admits his inability so to do.

The true line between the plaintiff and the defendant is the medial line of the party wall. If that wall was nine inches in thickness, then four and a half inches of it belongs to the plaintiff and four and a half inches of it belongs to the defendant. The evidence wholly fails to show that it was not a nine inch wall, and therefore fails to show the trespass upon the part of the defendant.

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Plaintiff claims that the fence in the rear of the house was over upon his line about two and a half feet, but no importance is attached to the fence, the proof being clear that it was a mere temporary structure, not fixed or stable in its nature.

I am of opinion that the case should be affirmed; but a majority of the court is of opinion that the instruction given by the court was prejudicial to the plaintiff in error, in view of his statement that one of the legs of the trestle was four inches inside of the line of his house, and are of opinion that the case should be reversed, and an order will be entered to that effect. Upon a subsequent trial of the case the jury should be instructed that the plaintiff is entitled to recover if the defendant has taken any part of the land of the plaintiff, either at or below the surface.

Cardwell, J., concurs in the opinion of Keith, P.

It seems to us clear, upon a proper construction of the conveyances in the case, that the center line of the party wall between the tenements on lots 811 and 811½, extended to the alley at the rear of the lots, constituted the true dividing line between the properties in controversy; and that the jury ought to have been so instructed. They ought, also, to have been instructed that if they believed from the evidence that the structures of the defendant extended beyond the dividing line and upon the premises of the plaintiff, they should find for the plaintiff to the extent of such encroachment; otherwise, they should find for the defendant.

*Reversed.*

Statement.

**Richmond.**

JUSTICE v. GEORGIA INDUSTRIAL REALTY CO.

March 11, 1909.

Absent, Keith, P., and Cardwell, J.

1. JUDGMENTS—*Fraud in Procurement—Collateral Attack—Condemnation Proceedings—Wife as Party—Dower.*—A wife having an inchoate right of dower in land is not a necessary party to a lawful proceeding against her husband to condemn the land for a public use, but is concluded by the judgment on the principle of representation, however irregular the proceedings or erroneous the judgment may be, but if the court was induced to render the judgment of condemnation by the fraudulent concealment of facts upon which it was founded, the wife, upon the death of her husband, may file her bill to set aside the condemnation proceedings and have dower assigned her in the land. A judgment or decree voidable for fraud practised upon the court which rendered it, and which is extrinsic and collateral to any issue submitted to the determination of the court may be impeached collaterally.
2. EMINENT DOMAIN—*Private Use—Concealment of Fact—Collateral Assault—Resolutions of City Council.*—The fact that condemnation proceedings were set on foot by resolutions of a city council is no reason why a judgment of condemnation obtained from the court by a fraudulent concealment of the fact that the land was not needed, or to be used for a public use, should not be collaterally assailed.

Appeal from a decree of the Law and Equity Court of the city of Richmond. Decree for defendant. Complainant appeals.

*Reversed.*

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The opinion states the case.

*Wm. L. Royall*, for the appellant.

*Munford, Hunton, Williams & Anderson*, for the appellees.

WHITTLE, J., delivered the opinion of the court.

The decree under review dismissed on demurrer a bill filed by the appellant, G. E. Justice, widow of W. M. Justice, deceased, to have assigned her dower in a certain island located in the waters of James river, in the city of Richmond, known as "Justis' Island," whereof her late husband had been seized in fee simple.

The material allegations of the bill are that the William R. Trigg Shipbuilding Company, a private corporation, undertook to acquire "Justis' Island" by purchase from W. M. Justis, for use in connection with its adjacent shipyard; that its efforts to purchase the island proving unsuccessful, it entered into an agreement with certain managing officers of the city of Richmond, to the effect following: That the city would condemn "Justis' Island" pretendedly, as necessary for the improvement of its harbor and when thus acquired would convey it to the Trigg Company in exchange for certain other property owned by that company, and which the city needed for its purposes, the company paying the agreed difference in values between the two properties in money; that in pursuance of this agreement the city council (well knowing that the island was not needed or to be condemned for the purposes stated in the ordinance, but was to be immediately conveyed to the Trigg Company in exchange for other property) passed an ordinance directing the city attorney to condemn the island for the alleged improvement of the harbor.

"Justis' Island" was condemned accordingly, and the contract between the Trigg Company and the city consummated by

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the execution of mutual conveyances to the respective properties. The condemnation proceedings gave no intimation to the hustings court of the agreement between the Trigg Company and the city, but the record represented to the court that the property was being condemned for a public use, and the court ordered its condemnation on that theory. It is further alleged that the condemnation proceedings were a fraud practiced upon the court.

The bill also alleges that the appellant was not a party to the condemnation proceedings, and had no knowledge of them until long after they were concluded; and that the appellee, the Georgia Industrial Realty Company, purchased the property in controversy with notice of the manner of its acquisition by the Trigg Company.

Taking as true, as we must do on demurrer, these properly pleaded allegations of the bill, we have the case of a municipal corporation, under the guise of acquiring private property for public use, in point of fact fraudulently procuring the condemnation of private property for private use. The question which confronts us, therefore, is shall a court of equity sanction a proceeding of this character upon the hypothesis that a judgment thus obtained is not amenable to collateral attack at the suit of the appellant, whose inchoate right of dower has since become consummate.

The decision of the trial court is placed upon the ground, "that Mr. Justis was the only necessary party interested in the condemnation proceedings had in the hustings court, except the city of Richmond, and that the decision of the hustings court upon all questions involved in that controversy is impregnable to collateral attack."

The conclusion of the learned court would unquestionably be sound in a lawful proceeding against the husband to condemn land in which the wife had an inchoate right of dower. In such case the wife, not being a necessary party under the statute, on the principle of representation, would be concluded, however

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irregular the proceedings or erroneous the judgment might be. But the view taken by the lower court loses sight of the distinction between a judgment which is voidable simply by reason of error of judgment of the court which rendered it, upon matters within the pleadings and issues, and a judgment voidable for fraud practiced upon the court which rendered it, and which is extrinsic and collateral to any issue submitted to its determination. The judgment in the first instance can only be corrected by writ of error or other direct proceeding, but in the last it may be impeached collaterally. *Mahoney v. State Ins. Co.*, 133 Iowa, 570, 110 N. W. 1041, 9 L. R. A. (N. S.) 490.

That distinction seems to be clearly recognized by the authorities. For instance, if a court of general jurisdiction in condemnation proceedings, with the facts before it, erroneously appropriates private property for private use, that is an error of judgment for which its sentence may be reversed on writ of error. But if, on the other hand, the court be induced to render such judgment by the fraudulent concealment of the facts upon which it is founded, such judgment is liable to collateral impeachment.

In the case of *Norfolk & Western Ry. Co. v. Mills*, 91 Va. 613, 21 S. E. 556, in a concurring opinion at p. 641 of 91 Va., Keith, P., announces the general principle, that "there is no instrument so solemn, there is no judgment or decree so binding, but that if fraud in its procurement be alleged and proved, it ceases to protect the wrong-doer or to obstruct the injured in the assertion of their rights."

"Fraud will vitiate any, even the most solemn transaction, and an asserted title to property, founded upon it, is utterly void." *U. S. v. Libellants, &c.*, 15 Peters, 518, 594, 10 L. Ed. 826.

The rule with regard to the distinction between cases in which judgments may and those in which they may not be impeached collaterally for fraud is stated thus: "They may be impeached by facts involving fraud or collusion, but which



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were not before the court or involved in the issue or matter upon which the judgment was rendered. They may not be impeached for any facts, whether involving fraud or collusion or not, or even perjury, which were necessarily before the court and passed upon." *The Acorn*, 1 Fed. Cas. No. 29, 2 Abb. 434. See also *Kansas City, &c. R. Co. v. Morgan*, 76 Fed. 429, 21 C. C. A. 468; *U. S. v. Chung Shee* (D. C.), 71 Fed. 277; *Amador C. & M. Co. v. Mitchell*, 59 Cal. 168; *Cotterell v. Koon*, 151 Ind. 182, 51 N. E. 235; *McCambridge v. Walraven*, 88 Md. 378, 41 Atl. 928; *Ward v. Southfield*, 102 N. Y. 287, 6 N. E. 660.

In the case of the *State of Michigan v. Phoenix Bank*, 33 N. Y. 9, the State of Michigan appointed a board of State officers to hear evidence and adjust a demand of the bank against the State. By fraudulent imposition on the board, the bank procured an award against the State for \$35,000. In a suit by the State against the bank to recover the money paid on the award, the bank pleaded the finality of the award; but the court of appeals of New York was of opinion that the award stood on the same footing as the judgment of a court, and held that a judgment procured by fraud imposed upon the court which rendered it could be collaterally impeached on that ground. This case was approved in *Hackley v. Draper*, 60 N. Y. 92; *Ross v. Wood*, 70 N. Y. 11; and *Hunt v. Hunt*, 72 N. Y. 227, 28 Am. Rep. 129.

So, in the case of *Dunham v. Dunham*, 162 Ill. 589, 44 N. E. 841, 35 L. R. A. 70, the Supreme Court of Illinois disregarded a decree for divorce pronounced by a South Dakota court, because it had been procured by fraud practiced on the court. At page 80 of 35 L. R. A., the court observes: "But the court of South Dakota was not afforded an opportunity for the exercise of its discretion. By the concealment of appellant, the court had no knowledge that the very questions it was called upon to try in an *ex parte* proceeding were then at issue and pending in a prior suit in the State where both parties had been domiciled

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and where both had appeared. More than this, it was denied the knowledge that the very facts upon which its jurisdiction depended were then at issue in such prior suit. While the question is one not free from difficulty, we are of opinion that appellant failed to act in good faith to the court in which her suit was brought in South Dakota; that she was guilty of fraud upon the court and upon the public in obtaining her decree; and that it is therefore void."

So also, in the case of *Jackson v. Jackson*, 1 Johnson (N. Y.) 624, a married woman, herself and husband both being domiciled in New York, went to Vermont and obtained a decree for divorce and alimony, upon a ground for which she was not entitled to a divorce by the laws of New York. The Vermont decree was made the basis of a suit against the husband in New York to collect the amount allowed for alimony. But the court of the latter State held the decree void as having been recovered in *fraudem legis*. This case was approved in *Borden v. Fitch*, 15 Johnson (N. Y.) 146, 8 Am. Dec. 225. See also *Caswell v. Caswell*, 120 Ill. 377, 11 N. E. 343; *Schneider v. Sellers*, 25 Tex. Civ. App. 226, 61 S. W. 541, approved in *Schneider v. Sellers*, 81 S. W. (Tex.) 126.

In response to the suggestion that courts may not inquire into the motives of the city council in condemning the property in controversy, being legislative in their character, the case of *Nalle v. City of Austin*, 21 S. W. (Tex. Civ. App.) 375, is directly in point. In that case, certain citizens of the city of Austin conceived the plan of building a sufficient dam across the Colorado river to develop 14,000 horse-power. They accordingly induced the city authorities to build the dam, with the understanding that the city should have 2,000 horse-power for lighting, heating and other municipal uses, leaving a surplus of 12,000 horse-power to be sold by it for manufacturing purposes. The council accordingly passed an ordinance submitting to the voters of the city a proposition to authorize them to issue bonds of the city to the amount of \$1,400,000 for the purpose,

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as the ordinance declared, "of constructing a system of water works, and to furnish lights for the city and the citizens thereof." The court, at the suit of a citizen and tax-payer, enjoined the city from issuing the bonds, upon the ground that the charter only authorized it to produce enough water-power for the needs of the city, while the real purpose of the ordinance was to develop and sell horse-power in excess of its legitimate needs for private purposes.

To the same effect is the recent decision of this court in *Miller, Trustee, v. Town of Pulaski, ante*, p. 137, 63 S. E. 880, 2 Va. App. 829. The court there held, that "private property cannot be taken for a private use. The use which authorizes the legislature to grant to a corporation the power of eminent domain must be a public use; and the question whether or not in a particular case there is a public use is judicial and not legislative in its character, and is, therefore, one for the courts to determine. \* \* \* A grant of power to a municipal corporation to condemn property for the purpose of supplying the inhabitants of the municipality with water and electric lights, would be a strictly public use; but if the purpose be to supply water and electric lights to persons other than the inhabitants of the town itself, the use is not a public one, and the grant of power is void."

We are of opinion that the decree of the Law and Equity Court of the city of Richmond, sustaining the demurrer to the plaintiff's amended bill and dismissing the same, is erroneous and must be reversed, and the case remanded for further proceedings.

*Reversed.*

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Syllabus.

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**Richmond.**

McCROREY v. THOMAS.

March 11, 1909.

Absent. Keith, P., and Cardwell, J.

1. **APPEAL AND ERROR—Objections to Evidence—Changing Objection—Harmless Error.**—A party will not be permitted to make one objection to evidence in the trial court and another in the appellate court, nor will a case be reversed for the admission of evidence that could not have prejudiced the objector.
2. **INSTRUCTIONS—Safe Methods—Selections of Safer—Case at Bar.**—The instructions in the case at bar do not impose upon the defendant the duty of using the safer of two reasonably safe ways of managing an appliance, but of using a safe instead of an unsafe method under existing conditions.
3. **INSTRUCTIONS—Not Prejudicial—Case at Bar.**—Where the only difference between an instruction given and an amendment proposed by the defendant consists in the fact that, in the instruction given the duty was imposed upon the defendant of raising an awning if the wind was "dangerously high," and in the amendment the same duty was imposed if the wind was "high," the instruction given was not prejudicial to the defendant, and he cannot complain of it.
4. **SAFE PREMISES—Fall of Awning Over City Street—Liability of Owner—Independent Contractor.**—An owner of property who erects an awning over a city sidewalk is bound to exercise ordinary care to see that it is so secured and managed as to be able to withstand not only the ordinary vicissitudes of the weather, but the force of winds which experience has shown to be liable to occur in that locality. The fact that it was erected by an independent contractor is immaterial if it had been delivered to, and accepted by the owner.
5. **INDEPENDENT CONTRACTORS—Liability to Third Persons.**—Except under peculiar circumstances, an independent contractor is not

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liable for an injury to the person or property of one not a party to the contract, occurring after the independent contractor has completed the work and turned it over to the owner or employer, and the same has been accepted by him, though the injury resulted from the contractor's failure to properly perform his contract.

6. NEGLIGENCE—*Presumption—Fall of Awning in City Street.*—Negligence is never presumed from the mere fact of injury, but an injury may occur under such circumstances as will warrant an inference or presumption of negligence. If a pedestrian traveling along a city sidewalk is injured by the fall of an awning attached to a building (and no issue is raised as to the awning being a nuisance) there is a presumption of negligence on the part of the owner or occupier of the house, and the burden is upon him to disprove the existence of negligence by evidence that, as a matter of fact, all proper and reasonable care had been taken.

7. APPEAL AND ERROR—*Excessive Verdict.*—A verdict will not be set aside as excessive in an action to recover damages for personal injuries when it is not so large as to indicate that the jury was actuated by partiality or prejudice.

Error to a judgment of the Court of Law and Chancery of the city of Norfolk in an action of trespass on the case. Judgment for the plaintiff for \$5,000. Defendant assigns error.

*Affirmed.*

The opinion states the case.

*Marshall R. Peterson and Thos. H. Willcox*, for the plaintiff in error.

*Starke, Venable & Starke*, for the defendant in error.

BUCHANAN, J., delivered the opinion of the court.

There was a verdict and judgment in the trial court in favor of Beatrice Thomas, an infant, who sued by her next friend, against J. G. McCrorey, for damages for injuries caused by the

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fall of an awning. To that judgment this writ of error was awarded.

It appears that on a windy day in January, 1907, the plaintiff, who was twelve years old, was walking along the sidewalk on Main street in the city of Norfolk, when an adjustable awning in front of and attached to the defendant's store, fell upon her, producing among other injuries a depressed fracture of the skull.

There was some question at the trial as to whether or not an operation would have relieved or prevented some of the injurious consequences which it was testified had or might probably result from the fracture.

Dr. McCormick, one of the plaintiff's witnesses, was asked the following questions, as appears from bill of exceptions No. 1:

"Q. Is there danger attending these operations? A. I think so.

"Q. Now, doctor, if the operation goes through and the child lives after the operation, can you say with any degree of certainty, that either or both of the conditions which will reasonably exist will be cured? A. I have not had wide experience or observation on the subject, but I have seen a man with a depressed fracture of the skull, who suffered from Jacksonian epilepsy and from epileptic symptoms. The depression was removed and he ceased having epileptic attacks, but the paralysis remained the same.

"Q. That has come under your observation? A. Yes, sir.

"Q. How was that injury occasioned? A. By a blow on the head.

"Q. How? A. Struck with a piece of iron rod over the center.

"To which last question the defendant, by counsel, objected; which objection the court overruled." The admission of this evidence is assigned as error.

The objection made to it here is that while the witness might

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give his opinion as to what generally might be expected to follow from such a blow, he had no right to give the results in an isolated case which came under the witness' observation.

Conceding that this is true, no such objection was made. The only thing objected to, so far as the bill of exceptions shows, was how the blow in the particular instance testified to was caused. The answer to that question could not have prejudiced the defendant.

Another error assigned is the action of the court in permitting Dr. Graves, another witness for the plaintiff, to answer the following question: "Doctor, from an examination and knowledge of the facts concerning the injury to this particular child, will you state to the jury how, in your opinion, her future will be affected by this injury with reasonable certainty."

The bill of exception No. 2, upon which this assignment of error is based, does not show what the objection to the question was, but when the bill of exception containing all the evidence of Dr. Graves is examined, it appears that the objection made to the question was, that it ought to be confined "to the facts within his (the witness') knowledge and not what the girl has told him." Upon the statement of the plaintiff's counsel, in reply to that objection, that the question related to what the witness knew, the court overruled the objection and permitted the question to be answered.

If there was the further objection to the question, that it was too broad and authorized the witness to enter into the realm of speculation as to the effects of the blow upon the future life of the plaintiff, as is now claimed in the petition, that objection ought to have been made at that time. A party will not be permitted to make one objection to evidence in the trial court and another in the appellate court. *Warren v. Warren*, 93 Va. 73, 74-76, 24 S. E. 913.

The action of the court in giving instruction No. 1, offered by the plaintiff, and in refusing to give that instruction as

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amended by the defendant in lieu of it, is assigned as error.

Three objections are made to the instruction given, viz.:

"(1) It imposed upon the defendant an absolute duty to use the safer of two ways, either of which, as a matter of fact, may have been reasonably safe in the judgment of a man of ordinary care and prudence situated under the same or similar circumstances.

"(2) It charged that as a matter of law it was culpable negligence in the petitioner, in the choice between alternatives, either of which may have been safe in the judgment of a man of ordinary prudence under the circumstances, not to have used the safer way, and thus took from the jury the very question which, under the settled principles of the common law, is peculiarly and necessarily referred to the determination of the jury, that is to say: Whether the conduct of the defendant was conformable with the requirements of ordinary care and prudence under the circumstances of the case.

"(3) It assumed the existence of a material fact."

The first and second of these objections to the instruction are based upon a misconception of its meaning. It does not raise the question of the defendant's duty to use the safer of two safe ways in the management of the awning, but it told the jury that if the use of the sidewalk was made dangerous to the plaintiff and others under the conditions that existed the day of the accident by the awning being left in a lowered condition, and that it would have been safe if the awning had been raised, then it was the defendant's duty to adopt the safe method; and that if he knew, or in the exercise of ordinary care could have known, that such a wind was blowing and beating upon the awning as to make it dangerous when down, then he was guilty of negligence.

The other objection to the instruction is that it assumes a material fact, viz.: that the wind at the time of the accident was "dangerously high." The only substantial difference upon this point between the instruction which was given and that which



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the defendant sought to have the court give in lieu of it is that in the one the wind is described as "a dangerously high wind," and in the other as "a high wind."

It was not assumed in the instruction as given, nor in the instruction as amended and rejected, that the wind was of the character described in either; but in the one the court told the jury that if the wind was "dangerously high" then it was the duty of the defendant to raise the awning, if he knew or could by the exercise of ordinary care have known that such a wind was blowing. In the other, the court was asked to tell them that if the wind was "high" then it was the defendant's duty to raise the awning if he knew or could by the exercise of ordinary care have known that such a wind was blowing. In that given, the duties which the defendant owed to the plaintiff were made to depend upon the question of whether or not the wind was "dangerously high," and in the other merely upon the question of whether or not the wind was "high." There was, under the facts of the case, really no difference between the two instructions as to the character of the wind necessary to make it the duty of the defendant to raise the awning for the safety of the plaintiff and others traveling on the sidewalk; but, if there was any difference, a higher wind was required in order to make it the duty of the defendant to raise the awning in the instruction given than was required in the instruction refused, and, therefore, the one given was more favorable upon this question to the defendant than the one refused. We see no error in the instruction given to the prejudice of the defendant upon either of the grounds of objection made to it.

The court was requested and refused to give the following instruction: "The court instructs the jury, that if they believe from the evidence that the defendant contracted with Hogshire for a stipulated sum to erect the awning referred to in the declaration, that Hogshire was a competent man, that he exercised exclusive control in the selection and discharge of employees in the performance of said work and in payment of wages due

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therefor; that the defendant exercised no authority or control over said workmen; that the awning was erected by Hogshire and accepted by the defendant in apparently good condition, then they must find for the defendant, unless they shall further believe from the evidence that some defect existed in the awning at the time of its acceptance, or subsequently developed therein, which should have been discovered by the defendant in the exercise of ordinary care or unless they shall further believe from the evidence that said awning was negligently used and managed."

In the erection and maintenance of the awning over the sidewalk, the defendant was bound to exercise ordinary care to see that it was so secured and managed as to be able to withstand not only the ordinary vicissitudes of the weather, but the force of winds which experience had shown to be liable to occur in that locality. Whether it was erected under the supervision of the defendant or by an independent contractor would seem to be wholly immaterial, unless the injury complained of was caused before the independent contractor had completed the work and turned it over to the defendant. For it is well settled that, except under peculiar circumstances which do not exist in this case, the independent contractor is not liable for an injury to person or to property of one not a party to the contract, occurring after the independent contractor has completed the work and turned it over to the owner or employer, and the same has been accepted by him, though the injury resulted from the contractor's failure to properly perform his contract. See *Winterbottom v. Wright*, 10 M. & W. 109; *Young v. Smith & Kelly*, 124 Ga. 475, 52 S. E. 765, 110 Am. St. Rep. 186, 4 Am. & Eng. Ann. Cases 226, and note 228; 1 Thomp. on Neg. sec. 686; Wharton on Neg. sec. 439.

The awning had been erected by the independent contractor and turned over by him to the defendant and accepted by him a year or more before the plaintiff was injured; yet, by the instruction in question, the court was asked to tell the jury, in

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substance, that the defendant was not liable for the plaintiff's injury if the awning was erected by a competent, independent contractor and turned over to the defendant in apparently good condition, unless it further appeared that some defect existed in the awning at that time or subsequently developed therein which should have been discovered by the defendant in the exercise of ordinary care, or that the awning was negligently used or managed. In the event the jury had believed that the awning had been erected by a competent independent contractor and accepted by the defendant from him in an apparently good condition, the instruction would have required the plaintiff, in order to recover, to prove that some defect existed in the awning at the time of the defendant's acceptance, or subsequently developed therein, which should have been discovered in the exercise of ordinary care, or that the awning was negligently used or managed. To have placed this burden upon the plaintiff in a case like this would have been clearly erroneous.

While negligence is never presumed from the mere fact of injury, yet an injury may occur under such circumstances as will warrant an inference or presumption of negligence. This is so where the defendant owes to the plaintiff a duty to use care and the thing causing the injury is shown to be under the management of the defendant or his employees, and the accident is such that in the ordinary course of things it does not occur if those who have the control or management use proper care. It is well settled that where a pedestrian traveling along a highway is injured by the fall of an awning attached to a building (and no issue is raised as to the awning being a nuisance), the liability of the owner or occupier of the house is to be determined upon the principle of negligence in accordance with the phrase or maxim, *res ipsa loquitur*; or, in other words, an injury under such circumstances is held to warrant the presumption of negligence, which puts the burden upon the defendant to disprove the existence of negligence by evidence that as a matter of fact all proper and reasonable care had been

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employed. See Watson's Article on Negligence, 21 Am. & Eng. Enc. L. (2nd ed.), 512-515; 29 Cyc. 589-594; *Walton v. Ross*, 100 Minn. 7, 110 N. W. 252, 12 L. R. A. (N. S.) 721, 117 Am. St. Rep. 661, 10 Am. & Eng. Ann. cases, 715, and note, 718-19, and cases cited; *Richmond Ry. &c. v. Hudgins*, 100 Va. 409, 41 S. E. 736; *Hogan v. Manhattan Ry. Co.*, 149 N. Y. 23, 43 N. E. 403; *Khron v. Brock*, 144 Mass. 516, 11 N. E. 748; *St. Louis, &c. Ry. Co. v. Hopkins*, 54 Ark. 290, 15 S. W. 610, 12 L. R. A. 189, and note.

The instruction was not a correct statement of the law and the court properly refused to give it.

From what has been said in reference to that instruction, it follows that there was no error in the court's action amending instruction "D," asked for by the defendant, imposing upon him the burden of proving that the awning was erected and maintained with ordinary and reasonable care, unless this appeared from the testimony of the plaintiff or from all the facts and circumstances of the case.

If the discussion in the petition as to the verdict can be considered as a sufficient assignment of error to the action of the court in refusing to set aside the verdict, it is only necessary to say, that this court is of opinion that the instructions submitted the case to the jury as favorably to the defendant as he was entitled to have it submitted, and that the verdict is sustained by the evidence.

The amount of damages allowed is not so large as to indicate that the jury was actuated by partiality or prejudice in assessing them, without which, under a long settled practice, the verdict in cases of this character cannot be set aside on the ground that it is excessive. *Norfolk, &c. Co. v. Spratley*, 103 Va. 379, 49 S. E. 502; *C. & O. Ry. Co. v. Harris*, 103 Va. 643, 49 S. E. 997, and cases cited.

The judgment complained of must be affirmed.

*Affirmed.*

## Syllabus.

**Richmond.**

## MONARCH LAUNDRY AND OTHERS v. WESTBROOK.

March 11, 1909.

1. SALES—*Reservation of Title—Recordation—Code, Section 2462.*—A reservation of title to engines, boilers and machinery which a vendor, by a written contract, sells to a vendee, and installs for use in a plant for the conduct of a laundry business is valid as against subsequent purchasers of the plant from the vendee, or mortgagees thereof, where it appears that the contract reserving the title was duly docketed in accordance with the provisions of section 2462 of the Code prior to the sale or mortgage. The docketing or recordation of such a contract constitutes constructive notice thereof to third persons. Such was the object of the statute.
2. FIXTURES—*Purchasers—Notice.*—A vendee or mortgagee of realty, with notice of the rights of third parties in fixtures, takes subject such rights.
3. SALES—*Reservation of Title—Code, Section 2462—"Goods and Chattels" "Movable" Property.*—The term "goods and chattels" used in section 2462 of the Code, relating to the reservation of title to personal property, is restricted to "visible, tangible and movable" personal property as distinguished from choses in action, but is not restricted to movable personal property of the same class to which a slave belonged. "Movable" means "that which may be lifted, carried, drawn, turned or conveyed, or in any way made to change its place or position."
4. FIXTURES—*Reservation of Title—Engines and Boilers.*—Engines, boilers and machinery for a laundry are movable personal property, and, if the terms of the statute (Code, section 2462) are complied with, the title thereto may be retained by the vendor, although installed as part of the plant.
5. SALE OF PERSONAL PROPERTY—*Conditional Sale—Insufficient Description of Property.*—A contract for the sale of specific personal property, reserving title thereto, which further provides for furnishing such "additional shafting, piping, connections, etc.

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as may be required to complete the said plant as to the motive power of the same," is too vague and indefinite in its description of the additional shafting, etc., to be supplied, to enable a stranger to identify the property with any degree of accuracy, and hence the title sought to be reserved cannot be protected as against a subsequent purchaser for value and without other notice thereof.

Error to a judgment of the Court of Law and Chancery of the city of Norfolk in a proceeding under section 2462 of the Code. Judgment for the plaintiff. Defendants assign error.

*Affirmed.*

The opinion states the case.

*Thos. W. Shelton*, for the plaintiffs in error.

*Robert M. Hughes, Jr.*, for the defendant in error.

CARDWELL, J., delivered the opinion of the court.

Appellants, in the oral argument, waived their assignments of error other than those which present the question, whether a reservation of title to personal property in the shape of engines, boilers and machinery, which a vendor by written contract sells to a vendee, and installs for use in a plant for the conduct of a laundry business, the contract reserving title having been duly docketed in accordance with section 2462 of the Code of Virginia, is valid as against purchasers from the vendee (mortgagees of the realty), who purchased, as in this case, after the engine and boiler with its attachments and equipment had been installed in the laundry plant.

By the agreed statement of facts, the engine, boiler and machinery in question were installed in vendee's plant, and the contract reserving title to same was docketed as required by statute prior to the execution and recordation of certain deeds of trust afterwards given upon the vendee's building and con-

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tents, and upon which deeds of trust the rights, if any, of the appellants attacking the validity of the title reservation depend.

In certain particulars, appellants and appellee differ in their view of the evidence, the appellants contending that the boiler, engine and machinery were so installed in the building of the laundry company as to make them a part of the realty, while appellee contends that the engine, boiler and their equipment, even, from a physical standpoint, and independent of other controlling questions, did not become a part of the realty, but were so installed as to be removable.

We consider it unnecessary to review at length the history, purpose and policy of the statute—sec. 3462 of the Code, *supra*. Suffice it to say, that previous to this statute, the law of the State was, that where a vendor agreed to sell personal property for a price to be paid at a future time, and delivered the possession, but expressly retained title to the property until payment, such an agreement constituted a conditional sale; and though by parol or by an unrecorded instrument, such reservation was valid as against vendees, creditors and subsequent purchasers with or without notice. Whereupon, the statute, now sec. 2462, *supra*, restricted that doctrine for the protection of innocent third parties by providing that such reservation of title should be void as to them unless recorded in such a way as to give notice.

The statute in its original form, as enacted at the legislative session of 1883-4—Acts of 1883-4, p. 27—provided that the notice should be given “from the time the said writing is duly admitted to record,” etc. By the present statute, *supra*, engrafted in the Code of 1887, there is substituted for the requirement of the previous statute that the instrument itself be recorded as deeds of conveyance are required to be recorded, the requirement only that a memorandum of the contract containing certain information specifically prescribed should be docketed by the clerk of the court of the county or corporation, in whose office deeds and other writings were required to be recorded; and

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further provides, that "the docketing and indexing of such memorandum of such contract as provided for shall have the same effect as to creditors of and purchasers for value without notice from the vendee as if said contract were recorded according to the provisions of chap. 109 of the Code of Virginia."

Section 2465 of the same chapter of the Code, under the caption "contracts, deeds, etc., that are void as to creditors and purchasers unless recorded," provides: "Every such contract in writing and every deed conveying any such estate or term, and every deed of gift, or deed of trust, or mortgage conveying real estate or goods and chattels, and every bill of sale or contract for the sale of goods and chattels \* \* \* shall be void as to subsequent purchasers for valuable consideration without notice, and creditors, until and except from the time that it is duly admitted to record in the county or corporation wherein the property embraced in such contract, deed or bill of sale may be," etc.

This whole chapter of the Code treats the matter of the recordation of documents as to realty and personalty in one category and provides for their recordation, and in the light of the entire chapter there is no room for doubt that it was intended by the legislature that the docketing or recordation of a contract of sale of personal property, reserving title thereto until the purchase money is fully paid, as provided by sec. 2462 of the Code should constitute notice to third parties.

But it is argued for appellants that while this view of the statute may be correct and appellee has complied with its terms, such machinery as is involved in this controversy was never intended to come within the purview of the statute; that while this machinery was personal property when sold, it became, as a part of the plant of the laundry company, real estate, and by its nature it was intended to remain where placed as a part of a general scheme; and that, as said in *Kirkland v. Brune*, 31 Gratt. 127: "The act manifestly refers to such property and such 'goods and chattels' as are visible, tangible and movable."



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It is very true that the statute refers to "such goods and chattels as are visible, tangible and removable," but that the engine, boiler, etc., here in question, because put into and made to form a part, however important, of a laundry plant, ceased to be visible, tangible and movable personal property within the purview of the statute in a *non sequitur*.

In *Kirkland v. Brune*, *supra*, and *Bank v. Holland*, 99 Va. 505, 39 S. E. 126, 86 Am. St. Rep. 898, 55 L. R. A. 155, relied on for appellants, the court was dealing in the one case with choses in action, "invisible and intangible," and in the other with a gift of like property, while here the subject of the controversy is visible, tangible, movable, personal chattels, such as are objects of the senses, deliverable in specie. We are unable to appreciate the force of the argument of the learned counsel for appellants, that under the review of the history of the statute and the reasoning of the opinion in *Bank v. Holland*, *supra*, the doctrine of *ejusdem generis* applies to this case, and the terms of the statute are to be confined to "movable personal property of the same class or kind of chattels to which a slave belonged," *i. e.*, such as could and would likely be moved from county to county and without the vendor finding it out within a year, referring to sec. 2414 of the Code. But if it could be conceded that this view is correct, it would not avail appellants in this case. Besides, being a matter of common knowledge that so-called stationary engines and boilers of the class involved here are movable, and are frequently removed from place to place, the evidence, as we shall presently see, is conclusive on that point.

The definition of the word "movable" is, "that which may be lifted, carried, drawn, turned or conveyed, or in any way made to change place or position."

The assertion is made that the machinery furnished by appellee constitutes appellant's laundry plant, the inference being that the security of the subsequent creditors secured on the realty would be destroyed; but there is nothing in the record

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warranting this assertion or inference. On the contrary, from the agreed statement of facts it appears that the value of the land is \$4,000, the cost of the building independent of the machinery, \$10,803.00; the cost of machinery in the building, \$10,050.00, of which latter less that \$4,000 thereof represents the machinery, etc., furnished by appellee, so that his machinery bears the same proportion to the total security of the subsequent deed of trust creditors as \$4,000 bears to \$24,853; while the aggregate of these subsequent deed of trust debts is only \$13,900.

It is very true that it was said in *Morotock Ins. Co. v. Rodefer*, 92 Va. 752, 24 S. E. 395, 53 Am. St. Rep. 846: "In this age of marvelous development of industries and multiplication of manufactures, it is a matter of common knowledge that it is the machinery and apparatus necessary for the production of the particular manufacture which form the principal part of the manufactory, and that the building in which they are placed and to which they are affixed serves but to inclose and protect them. They mainly constitute the manufactory of which the building is generally only an incident." But in that case (an action on a policy of fire insurance) the opinion was dealing with the question as to what constitutes *fixtures*, and after quoting from *Shelton v. Ficklin, Trustee*, 32 Gratt. 727, the opinion says: "Consequently the court cannot know merely from such general descriptive terms as 'all engines, machines, tools, appliances, connections, attachments, and contrivances of every kind,' when used in connection with a manufactory, whether they constitute in any particular case, like the one under consideration, what the law denominates *fixtures*, or retain their character as personalty. This can only be established by evidence."

In this case the evidence shows that the machinery, etc., furnished by appellee was installed by himself, who constructed the foundations therefor; that not only the machinery itself, but the foundations could be removed, and with the view of their possible removal. Appellee's witness, Corey, testifies that

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the boiler was of such a size that it could be taken through the rear door of the building without injury to the building; that the walls built for the boiler were separate from the walls of the building; that the smoke-stack could be removed without injury to the roof of the building, and that the concrete put down by appellee incidental to the installation of the machinery would not mix with the other concrete in the building when superimposed thereon, and could be easily removed without affecting the other concrete. The witness was asked: "Will you state whether or not this machinery, as installed by Mr. Westbrook, could be taken out of the Monarch Laundry plant without destroying the building or the floor?" and his answer was: "It can be removed without disturbing that part of the building. The floors can be left in as good shape as though the engines were not there."

Another witness, H. L. Key, who constructed the foundations for the machinery installed by appellee, corroborates the statements made by the witness, Corey, and this evidence is practically not contradicted.

It is thus shown that the property in question has never lost its character as personalty, and when installed the rights of the vendor and vendee became established, and obviously it would be inequitable and unjust to hold that the vendee could affect the rights of the vendor thus established by any subsequent action upon its part.

It would be impossible within reasonable limits of an opinion to review separately the cases relied on for appellants, however easily they may be distinguished from this case. Among those cases is *Haskins, Wood, &c. Co. v. The Cleveland Shipbuilding Co.*, 94 Va. 439, 26 S. E. 878, citing *Green v. Phillips*, 26 Gratt. 752, 21 Am. Rep. 323; *Shelton v. Ficklin*, 32 Gratt. 727; *Morotock Ins. Co. v. Rodefer*, 92 Va. 747, 24 S. E. 393. 53 Am. St. Rep. 846. The two last named cases we have already referred to, and as to the first it need only be said that as in *Shelton v. Ficklin*, there was no notice to the mortgagees of

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a secret interest in the property, if any in fact existed, and no understanding or intention among the parties that the property was to remain personalty.

In *Haskins, &c. Co. v. Cleveland, &c. Co.*, *supra*, the controversy was between a creditor of the corporation secured by a deed of trust subsequent to the contraction of the debt secured and a mechanic's lien creditor, and the court merely held that the property therein involved was a part of the realty and subject to a mechanic's lien, and there was no question involved of retention of title to chattels pursuant to the intention of the parties, as contemplated by the statute, section 2462 of the Code, *supra*.

As observed, the statute which makes the docketing or recordation of a written contract—which terms are used interchangeably under the purposes of the statutes (*Callahan v. Young*, 90 Va. 574, 19 S. E. 163)—notice to third parties; therefore, appellee's rights rest upon the principle of law established by a long line of authorities, that a vendee or mortgagee of the realty, with notice of the rights of third parties in fixtures, takes subject thereto, and some of them go to the extent of upholding the principle, even if the property became part of the realty from a physical standpoint. Among the cases referred to are, *Sword v. Low*, 122 Ill. 487, 13 N. E. 826; *Wilgus v. Gettings*, 21 Iowa, 177; *Northern Cent. R. Co. v. Canton Co.*, 30 Md. 347; *Warner v. Kenning*, 25 Minn. 173; *Priestly v. Johnson*, 67 Mo. 632.

In the first cited case, the court considering the question when fixtures would or would not become part of the realty and lose their identity as personalty, held that even in cases of doubt the intention of the parties must control. And in *Northern Cent. Ry. Co. v. Canton Co.*, *supra*, the opinion says: "Thus it is not so much the character of the structure as the circumstances under which it is erected that will determine whether it passes with the realty or is to be treated as personal property."

The reasoning of this line of cases is that if the agreement of

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the parties and the purposes of justice require that the title to both should be kept separate, the courts will so regard them, provided always that when the title to the personalty is retained pursuant to statutory provision, the notice to third parties required by the statute has been given, as is conceded was done in the case at bar. See also *Minor's Real Prop. sec. 27, p. 35.*

If the contentions of appellants were sustained, the entire purpose and policy of the statute would be defeated, since its very object is to give dealers like appellee a lien on the property of the kind furnished by him and thereby establish a means of credit to facilitate the conduct of dealing and methods of trade, such a policy being regarded as essential under the conditions growing out of the marvelous development of industries and the multiplication of manufacturers, spoken of in *Morotock Ins. Co. v. Rodefer, supra.*

The decree complained of ordered the laundry company to deliver to appellee or pay him the ascertained value (\$3,335.07) of the machinery and articles listed in his itemized bill in evidence, as of date or dates prior to May 4, 1907, the date of the contract between appellee and the laundry company, but refused appellee an order for that portion of the equipment, of the value of \$308.14, furnished after the date of the contract, May 4, 1907, shown in the schedule in evidence as furnished under this clause of the contract: "This agreement further contemplates furnishing the additional shafting, piping, connections, etc., as may be required to complete the said plant as to the motive power of same." The court refused to give a decree for the articles furnished under this clause of the contract, for the reason that they were not sufficiently described, and this ruling is assigned as error by appellee.

In *Williamson v. Payne*, 103 Va. 551, 49 S. E. 660, relied on by appellee, it was held that "a deed of trust on personal property gives a sufficiently definite description of the property granted when it enables a stranger to identify the property by the aid of proper inquiry such as the instrument indicates and

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directs." But this ruling does not help appellee as the contract with respect to the "additional shafting, piping, connections, etc.," to be supplied after the date of the contract is altogether too vague and indefinite to enable a stranger to identify the property with any degree of accuracy; and, therefore, we could not say that the lower court erred in so holding.

We are of opinion that the decree appealed from is right and should be affirmed.

*Affirmed.*

Statement.

**Richmond.**

**METROPOLITAN LIFE INSURANCE CO. v. DeVault's ADMIN-  
ISTRATRIX.**

March 11, 1909.

Absent, Keith, P.

1. **APPEAL AND ERROR—Verdict Sustained by Evidence—Life Insurance—False Representations—Suicide.**—Whether, in the case at bar, the representations made by the assured in his applications for the policy in suit were material and false, and whether the assured came to his death by suicide were questions of fact for the determination of the jury, who were properly instructed upon the law of the case. The burden of proof on these questions was on the defendant company and as the evidence fully sustains the verdict of the jury in favor of the plaintiff on both questions it cannot be set aside on a writ of error.
2. **LIFE INSURANCE—Evidence Required to Prove Suicide.**—The defense of suicide to an action on a life insurance policy, in order to avail, must be established by evidence which excludes every hypothesis of accidental death. The burden of proof on that issue is on the defendant company.

Error to a judgment of the Corporation Court of the city of Fredericksburg in an action of *assumpsit*. Judgment for the plaintiff. Defendant assigns error.

*Affirmed.*

The opinion states the case.

*B. Rand. Wellford* and *A. T. Embrey*, for the plaintiff in error.

*B. P. Willis* and *St. George R. Fitzhugh*, for the defendant in error.

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CARDWELL, J., delivered the opinion of the court.

The policy of insurance sued on by defendant in error as administratrix of her deceased son, Edgar E. DeVault, was issued by plaintiff in error December 15, 1906, loss, if any, payable to the estate of the insured; and the insured, Edgar E. DeVault, came to his death by drowning April 26, 1907.

After the death of the deceased, defendant in error furnished, upon blanks provided by plaintiff in error, proof of the death, and under date of June 3, 1907, received a letter from the secretary of the insurer informing her that the claim under the policy had been approved for payment, and check of same date gone forward to the superintendent of the company, whose office was in Richmond, Virginia, who, upon presentation of the letter would turn over to defendant in error the check and take receipt and release on account of the policy, but to this letter was appended notice, that if error was discovered prior to the receipt for the check, the company would have the right to direct its representative to withhold the payment until the error was rectified; and, later, upon request of the company, defendant in error through Mr. Hanway, assistant superintendent of the company for Lee district, Virginia, at Fredericksburg, furnished authenticated copies of the coroner's verdict over the body of the deceased, and of loss, as required by the policy; whereupon, the company tendered to defendant in error by check the amount of the first premium paid on the policy, in full settlement thereof, declining to pay the face value of the policy on the ground that the policy had lapsed by reason of the death of the insured by suicide, which tender defendant in error refused, and thereupon instituted this action on the policy.

What there may have been in the report of the inquest, if anything, which caused plaintiff in error to change its position with reference to its liability on the policy, does not appear in the record.

At the trial, plaintiff in error made defense—first, breach of



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the warranties contained in the policy and in the application therefor; and, second, breach of the condition of the policy which provides: "If the insured, within two years from the issue hereof, die by his own hand or act, whether sane or insane, the company shall not be liable for a greater sum than the premiums which have been received on this policy."

The verdict of the jury was in favor of defendant in error for the amount of the policy, which verdict the court refused to set aside on the motion of plaintiff in error, and entered judgment thereon. We are asked to review that judgment, set the same aside and award a new trial to plaintiff in error, upon the ground, solely, that the verdict of the jury is contrary to the evidence, or without sufficient evidence to sustain it.

The rule governing in such a case is so repeatedly and plainly stated in the numerous cases adjudicated by this court, interpreting the statute—sec. 3484 of the Code—as to render its repetition here needless.

Whether the representations made in the application for the policy by the assured were material and false, and whether the assured came to his death by suicide, were questions of fact for determination by the jury, and it is not claimed that the jury were misdirected as to the law upon the facts which the evidence tended to prove. Conceding that the representations were material, were they false? was the question submitted to the jury.

For several years prior to his death, the insured had been a resident of the city of Fredericksburg, where he attended school and afterwards engaged in business as a life insurance agent. In the fall of 1906, he was employed as one of the local agents of plaintiff in error, first under an assistant superintendent named Ferguson, who removed from Fredericksburg about December 1, 1906, and subsequently under one, Thomas H. Hanway, with whom he continued until March, 1907, when he was asked to resign his position, which he did.

December 7, 1906, soon after the arrival of Assistant Super-

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intendent Hanway in Fredericksburg, deceased made application to him for a policy of \$1,000 on his life. Hanway considering the applicant a good risk took the application and submitted it with the physician's examination to the home office, and in the usual course the policy was issued, bearing date December 15, 1906.

The false answers of the insured relied on to invalidate the policy were answers to the questions as to the applicant's use of intoxicating liquors at the time the application was made and prior thereto, which were as follows:

"15. To what daily or other extent do you use alcoholic stimulants? Ans. None. Wine or malt liquors? Ans. None.

"16. Have you ever used opium or other narcotics, or ever used alcoholic stimulants, wine or malt liquors or tobacco to any excess? If so, when and how long? Give particulars. Ans. No."

Observing that there is no pretense that the insured, at the time of or prior to his application for the policy used daily alcoholic stimulants, wine or malt liquors, or ever used opium or other narcotics or tobacco, we shall direct our attention to the evidence as to whether or not he ever used "alcoholic stimulants, wine or malt liquors to any excess," and "if so, when and how long."

The evidence for plaintiff in error (defendant below) is as follows:

S. W. Somerville, a teacher at Fredericksburg College, resident of Fredericksburg, says that he knew plaintiff and deceased since their residence in Fredericksburg, about four years; first he ever heard of deceased drinking was in January or February, 1907, and he went to him and remonstrated with him, telling him how it would pain his mother, and deceased promised he would not drink again; that deceased stated that "he had taken drinks in China and drinking there is not looked upon as it is here."

G. W. Bahlke, plaintiff in error's superintendent for Lee

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district, says that he knew nothing of the habits of deceased, and merely outlines the method of procedure by which a policy in the company is procured, what had been done in this case, and the refusal of the company to pay the policy. He says, however, that a policy would not necessarily be declined issue if the applicant said that he drank intoxicating liquor, but investigation would be made to determine the extent of the drinking; that if applicant was young with habits and character not formed, and was given to intoxication or drank to excess, the policy would not issue; that if applicant was older and habitually intemperate, policy would not issue; that if applicant occasionally used alcoholic stimulants and was not a drunkard, policy would probably issue; that if applicant was young and did not drink to excess, policy would probably issue; that the mere fact that a person got on a spree once in three months would not necessarily keep a policy from issuing.

The difference in the materiality of the answer of a young man to the question, "whether he used alcoholic stimulants to excess," and an answer by an older applicant to the same question, is but an expression of the witness' opinion, as there is nothing in this record to show that plaintiff in error had any such rule, which it had published for the information of persons applying to it for insurance. In fact, according to this witness, the insurer makes no such discrimination, and attaches no importance to the use of alcoholic stimulants, unless used to excess. He says, if policy is issued no increased charge of premium is made on account of the use of alcoholic stimulants, and that if the company issued policy at all, the premium was the same, whether applicant was a total abstainer or an occasional drinker.

Hawkins, another witness for plaintiff in error, a real estate agent with office in the rear of the room of plaintiff in error, had lived in Fredericksburg about a year and had known deceased from September, 1906. He says that in the fall of 1906 he thought deceased was of age, and had taken with him

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several drinks of whiskey, probably six, before finding out he was a minor, and then would drink with him no more; that he knew deceased drank whiskey, had smelled it on his breath quite frequently in the insurance office; that in October, 1906, deceased had spent the night in Richmond, and on his return to Fredericksburg came to the office and his face and manner showed he had been dissipating in Richmond; that deceased told witness that he had been on a spree in Richmond, and was going home to lie down, "but deceased was not drunk then;" that witness advised deceased to go across the street to the Exchange Hotel and get some sleep; that it was then morning; that deceased took witness' advice and went to the Exchange Hotel; that thereafter witness smelled liquor on deceased's breath, but never saw him under the influence of liquor prior to December 24, 1906. Of this witness we shall have more to say when we come to consider the question, whether or not the deceased came to his death by suicide.

Dr. Scott, plaintiff in error's medical examiner in Fredericksburg, merely identifies the signature of deceased to the medical examination as the basis for the insurance policy, and states that witness performed the examination, etc., which is not disputed, but witness says that he knew nothing of deceased's habits.

Sam Jones (colored), says that for a year or more he had been a porter at the Exchange Hotel, in Fredericksburg, right across from the office of plaintiff in error; that he knew deceased and had known him in the summer of 1906; that in the summer of 1906 witness was with W. A. Bell & Co.'s driver on a furniture van, and passed the City Park in Fredericksburg; that witness saw deceased drunk in the park and on his hands and knees; that witness had Mr. Bell's boy stop the van and let him get out, and that witness went to deceased and helped him up, and deceased told witness he could get along all right; that in the fall of 1906, and before September 26, deceased came to the Exchange Hotel one morning "pretty

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drunk" and asked of a clerk, now dead, a room, and upon the clerk collecting 50 cents from deceased witness helped him upstairs, to get off his overcoat and shoes, and left deceased with instructions to call him at 4 o'clock in the afternoon, which witness did; that a short time thereafter, on the night of the fair german, during the agricultural fair at Fredericksburg, witness was shining shoes of a Mr. Hall near the lavatory in the hotel, and deceased passed witness "pretty drunk" and brushed against witness, causing witness to spill polish on the breeches and socks of Mr. Hall, though witness could not remember the day or the month.

The next witness for plaintiff in error was Hanway, its assistant superintendent for Lee district, Virginia, who after stating his relations with plaintiff in error, his age to be 44 years and married, etc., says he took occasional drink when he needed it, but did not make a practice of drinking; that he solicited the policy sued on, knew nothing of deceased until in November, 1906; knew nothing of deceased's "habits or practices," until after policy sued on was issued; that in the winter of 1906, or in January, 1907, knew that deceased was drinking; that deceased would come in the office smelling of whiskey and partially intoxicated, and witness had several fatherly talks with deceased and urged him to give up the habit; that deceased stated that he used to drink in China, and witness told deceased that if he did not stop drinking he would have to resign as agent of the company, but deceased did not give up drinking. and finally, in March (1907) witness told deceased that on account of his drinking he would have to quit the company, and witness recognized acknowledgment of deceased's resignation, which had been already put in evidence; but witness says that December 24, 1906, was the first time he saw deceased under the influence of whiskey, and saw him under the influence of whiskey only twice after that.

The remaining witness for plaintiff in error, C. O'Connor Goolrick, attorney at law, practicing in Fredericksburg, testi-

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fied that he knew deceased; that witness helped lead the fair german in 1906; that the german was the night of the second day of the fair, September 26, 1906; that about 9 o'clock that evening witness was at the Exchange Hotel to get his shoes shined, and while Sam Jones was shining them witness saw deceased come into the hotel, and deceased appeared to be a little drinking, but was not drunk.

Defendant in error (plaintiff below), testifying in her own behalf, after introducing the policy of insurance sued on, held by her decedent, and the receipt of plaintiff in error for the premium thereon, paid December 15, 1906, glued to the policy, and countersigned by Hanway, assistant superintendent, on the 31st day of December, 1906, testified that she had been twice married, and was then a widow; that her first husband, Dr. Elijah E. DeVault, father of the deceased, and her second husband, Rev. J. E. Bear, both died when missionaries in China; that deceased was born at Tung Chow, China, November 2, 1886; that witness moved to Fredericksburg, Va., about four years prior to the date of the trial of this suit, her intention being to avail herself of the opportunities afforded at Fredericksburg for the education of her children; that deceased was an excellent swimmer; that she had seen him swim in matches in China; and (omitting that part of her evidence already stated) the witness further says that the day of deceased's drowning was the first day of the opening of the Jamestown Exposition, and was very warm for the season. On cross-examination, the witness testified that she had attended to room of the deceased in which he usually slept, during his lifetime; that she had never known him to drink intoxicating liquor, had never seen any in his room, had never smelled any on his breath; that she had been informed after January 19, 1907, by Prof. Sommerville, that he had been told that her son, the deceased, had taken some liquor at the college rehearsal; that while she knew Prof. Sommerville to be an entirely creditable man and a friend of hers, who imparted said information in a friendly

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manner, she did not believe it. Witness further testified (and this is not controverted) that deceased had, prior to December 7, 1906, two policies in defendant company (plaintiff in error) each for \$500, which she thought he had given up to take out the policy sued on, which had more advantageous conditions.

We have set out in inverse order the evidence in chief, for the reason, *first*, that the burden of proof to establish the materiality of the concealment or misrepresentations relied on by plaintiff in error to avoid the policy sued on, as well as the fraudulent intent, and that the policy was avoided by virtue of the failure of the applicant to answer the questions propounded to him by the medical examiner in accordance with the stipulations of his application, was upon the plaintiff in error (*Elliott on Ins.* 118; 25 Cyc. 928; *Wytheville Ins. Co. v. Stultz*, 87 Va. 634, 13 S. E. 77; *Home Ins. Co. v. Sibert*, 96 Va. 406, 31 S. E. 519); and *second*, because defendant in error (plaintiff below), as shown by her own statement and the letters of plaintiff in error which she produced to the jury, knew of no defense to be made to the payment of the policy, other than that "by lapse, suicide," until the trial of the case was on.

Upon the issue of suicide, the "star witness" for plaintiff in error is Hawkins, whose evidence on the other branch of the case is given above. After stating that on the date of deceased's death, witness and Fairfax were with deceased at a saloon together, and although deceased did not drink with them or get liquor at the saloon, he frequently went to a closet connected with the saloon, and appeared to be getting intoxicated, and became very drunk; that witness and Fairfax took deceased up the Boulevard to sober him up, \* \* \* turned back and came down the Boulevard, and "went down to the steamboat wharf, the deceased all the while getting drunker; arriving at steamboat wharf witness took deceased's coat off and laid deceased in the shade of the freight house, and then witness walked down the river shore about one hundred or more yards and watched some men loading ties; that witness heard a splash in the water, or heard some one holler, and saw that deceased was

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in the river swimming easily with the breast stroke and apparently making for the Stafford shore almost at right angles to the Fredericksburg shore line; and deceased had on his coat, shoes and all of his clothes, except his hat \* \* \* ; that deceased looked backward at witness and smiled, but kept swimming easily \* \* \* ; that when about the middle of the river deceased threw both hands up above his head a few inches, \* \* \* sank out of sight; that deceased was apparently a good swimmer; that it was easier to get out of the river on the Stafford shore than on the Fredericksburg shore and that he did not know whether deceased was taking a bath or fooling; \* \* \* that prior to drowning there was nothing in deceased's conversation or demeanor to indicate suicide; that deceased told him he was an excellent swimmer and had certificate for winning swimming match; that steamboat wharf inclined steeply to river, and deceased probably stumbled off wharf; that on morning of death of assured he and witness had been planning to buy a horse in partnership for purpose of canvassing their business in country."

What became of Fairfax, the companion of Hawkins, and why he was not examined as a witness in this case, is not shown by the record.

In rebuttal, defendant in error introduced seven witnesses. The first, W. E. Carson, testified "that the tide was ebbing and about half out, and that when the swimmer (deceased) was \* \* \* apparently swimming easily and evenly, his head and hands appeared above the water \* \* \* and he sank and rose no more." That steamboat wharf was 8 or 10 feet above the water; that the bank on the Stafford side of the river was much lower than on the Fredericksburg side; and that one could easily get from the water on the Stafford side of the river.

James M. and Marshall Turner both testify, "that steamboat wharf was 10 or 12 feet higher than water in the river, and had a sharp slope downward from the freight house to the water's edge—sharp enough for a barrel or a person lying down to roll



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off the wharf into the river." James M. Turner further says that he did not witness the drowning and did not know deceased, but that on the day of the drowning he observed three men, Hawkins, Fairfax and deceased going towards steamboat wharf; that deceased appeared very drunk, and his companions were half dragging and half toting him; that deceased's head was hanging forward with his chin nearly or quite on his breast, and that witness knew a drunken man, should he fall into the water, might be very much revived by contact with the water, and that one too drunk to walk might yet swim very well.

J. W. Masters, says that he was familiar with the steamboat wharf, and corroborates the Turners as to its height above the water, and the sloping of the wharf toward the water; that the Stafford shore, opposite the steamboat wharf was lower, and that one in the water could easily get from the water to the Stafford shore, while considerable difficulty would be experienced in getting from the water to the Fredericksburg shore:  
 \* \* \* that a person very drunk might be sobered \* \* \*  
 by sudden contact with water, and that drunkenness did not necessarily affect ability to swim. The witness further says that he "was there about two minutes after the drowning, and the impression upon him from what he heard and saw was, that DeVault either rolled or staggered into the water."

It is readily to be observed that the testimony on this branch of the case, even that of the witness, Hawkins, shows not a single circumstance connected with or surrounding the death of DeVault, the insured, that is not as consistent with accident as with suicide.

"The defense of suicide, to avail, must show that every hypothesis of accidental death is excluded by the evidence.  
 \* \* \* The burden of proving the defense of suicide was on the defendant. \* \* \* Where the evidence of self-destruction is circumstantial, the defendant fails unless the circumstances exclude with reasonable certainty any hypothesis of death by accident." *Cosmopolitan L. Ins. Co. v. Koegel*, 104

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Va. 633, 52 S. E. 166, and authorities there cited. See also *Boynston v. Equitable L. A. Co.*, 105 La. 202, 29 South. 490, 52 L. R. A. 687; *Brown v. Sun L. I. Co.* (Tenn. Ch. App.), 57 S. W. 415, 51 L. R. A. 252; *Mu. L. I. Co. v. Wiswell*, 56 Kan. 765, 44 Pac. 906, 35 L. R. A. 258; 2 Bac. Ben. Soc. p. 849; *Standard L. Ins. Co. v. Thornton*, 100 Fed. 582, 40 C. C. A. 564, 49 L. R. A. 116.

In the last cited case it is said: "Accidental death will be presumed, and this presumption must be overcome by the proof of facts which exclude every hypothesis of death except by suicide."

The case before us is clearly one in which this court would not be warranted in disturbing the finding of the jury, that the insured's death was by accident and not by suicide.

Coming then, to the remaining witnesses who testify in rebuttal as to habits of deceased with respect to the use of alcoholic stimulants at and prior to the date of the policy sued on: G. R. Swift, Commonwealth's attorney for Fredericksburg, says that he boarded at Mrs. Barney's, had known deceased three or four years, that deceased in 1906 ate his meals at Mrs. Barney's at table with witness, that witness never saw deceased drunk, nor take a drink, nor smelled liquor on his breath. On cross-examination witness stated that he meant to tell the jury that he had never seen deceased take a drink of liquor, or under its influence, but did not intend to say that deceased could not have been under its influence without witness having observed it; that he knew deceased well and never had known or heard of his drinking prior to March, 1907.

Dr. J. N. Barney testified that "deceased ate at his table in 1906 and witness had known deceased for 4 years or more, never knew deceased to be under the influence of liquor or to take a drink, never smelled it on him \* \* \* ; that he never heard of his drinking till late in March, 1907."

W. Mayo Smith, about 23 years of age, a bank clerk and friend of deceased, says he had known him four or five years;

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that he had taken his meals with deceased at Dr. Barney's; slept with deceased in same room and bed in 1906, and never known deceased to take a drink, or be drunk, or under the influence of liquor, had heard that deceased drank, and in the spring of 1906 had talked with deceased about his drinking, and deceased promised him "to cut it out," and witness had no reason to believe from intimate acquaintance with deceased that he had drunk liquor since his promise up to December 7, 1906, the date of the policy sued on. This witness further says that he spent his evenings like a good many other men calling on the girls and his friends, that sometimes the deceased also called on the girls with him, but frequently did not; that witness was in the bank from nine o'clock in the morning until four in the afternoon and never knew deceased to get drunk until March, 1907.

In the light of this evidence, considered by the jury in connection with that of defendant in error, the application for the policy, the medical examination and the report thereon to the home office of the inspector (in which Hanway, assistant superintendent, in response to inquiry 9: "What does outside inquiry into applicant's habits disclose?" answered, "Good," and signed the certificate, containing: "Above is the result of my personal, careful investigation. I regard the risk as suited for the ordinary department, and I do recommend the issuance of the policy;" again, "on the basis of statements given in part 'A' and inquiry made of parties in Fredericksburg, Va., I deem this risk as measuring up to the standard of the ordinary department, and can recommend its acceptance"), which report of inspection was introduced by plaintiff in error at the trial without reservation, restriction or limitation as to any of its parts, it was quite natural for the jury to conclude, not only that the policy was not issued solely on the representations of deceased in his application, but as the result of "outside inquiry into applicant's habits;" and that the evidence given by plaintiff in error's leading witness, Hawkins, who had to con-

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ness that while he, an habitual drinker, had smelled liquor on deceased's breath when others daily associating with him, eating with him at the same table, and one sleeping with him, never did, he had never seen him under the influence of liquor until December 24, 1906, some time after the policy had issued, was entitled to little or no weight. Nor is it surprising that the jury, the sole judges of the credibility of the witnesses and the weight to be given to their evidence, should have discredited the improbable story of the witness, Sam Jones (colored), who not only contradicted the witness, Hawkins, as to deceased's being drunk December 24, 1906, but is himself discredited by Mr. Goolrick, another witness for plaintiff in error, as to decedent's condition on that occasion.

The evidence, as doubtless the jury viewed it, fails to show that deceased drank at all at the time of his application or for months prior theretofore; or that he ever drank *to excess* prior to the issuing of the policy. There is nothing in the evidence justifying the statement on plaintiff in error's brief, that deceased had stated "that he had acquired the habit of drinking in China," but the most that can be made of it is that he (deceased) had stated that "he had taken drinks in China."

In *Knickerbocker L. Ins. Co. v. Foley*, 105 U. S. 350, 26 L. Ed. 1055, Mr. Justice Field, speaking for the court, says: "No witness testified from his own knowledge, that deceased was of intemperate habits at the time he applied for the insurance and that he had always been so. \* \* \* The court did not, therefore, err in instructing the jury that if the habits of the insured 'in the usual, ordinary and every day routine of his life were temperate,' the representations made are not untrue, with-in the meaning of the policy, although he may have had an attack of *delirium tremens* from an exceptional over-indulgence. It could not have been contemplated from the language used in the policy that it should become void for an occasional excess by the insured, but only when such excess had by frequent repetition become a habit."

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The opinion in that case goes further than it is necessary to go upon the facts in this case, but its reasoning is cogent and apposite.

We are of opinion that the evidence in this case fully sustains the verdict of the jury in favor of the defendant in error upon both questions submitted to them, and therefore, the judgment thereon complained of must be affirmed.

*Affirmed.*

Syllabus.

**Richmond.**

NORFOLK AND WESTERN RAILWAY CO. v. HOLMES' ADMINIS-  
TRATOR.

March 11, 1909.

Absent, Keith, F. and Cardwell, J.

1. RAILROADS—*Grade Crossing—Care Required.*—A railroad company is bound to exercise care to avoid a collision when its road crosses a public highway at grade, and the greater the danger the greater is the vigilance required.
2. RAILROADS—*Negligence—Running Engines Backwards—Signals—City Ordinance—When Needless to Allege or Prove.*—Whether or not it is negligence to operate a locomotive engine backwards with no one on the tender to signal its approach is generally a question of fact for the jury, though under some circumstances it is negligence as a matter of law. To operate an engine backwards, over a populous thoroughfare of a city, on a dark night, when it is "drizzly or misty," with no light burning, no bell ringing, preceded by no flagman, and without any watchman or warning of any kind to persons passing along said street is negligence, and if the allegations of the declaration are sufficient to warrant the introduction of such evidence, the same may be shown without reference to the existence, pleading or proof of a city ordinance requiring such precautions to be taken.
3. RAILROADS—*Negligence—Street Crossing—What Allegations and Proof of Negligence Sufficient.*—A declaration against a railroad company for running over and killing a person at a street crossing in a city is sufficient when, after particularly describing the *locus in quo*, it alleges it to be the duty of the company to exercise due and ordinary care to keep a watch and lookout to avoid injuring persons passing over said crossing, and to give warning of the approach of its trains by ringing a bell, or by taking other means of notification so as to avoid such inquiry, and the breach of the duty so alleged. The particular mode

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or precaution, to the exclusion of others, need not be alleged. Under such allegation and breach as is above stated it is competent for the plaintiff to prove that there was no flagman, no watchman, no person riding on the front of the engine, that the engineer could not see from his cab, and that no light was burning and no bell ringing.

4. NEGLIGENCE—*Contributory Negligence—Case at Bar.*—Without reference to the rule which obtains on a demurrer to the evidence, a jury would have been well warranted in finding from the whole evidence in the case at bar that the plaintiff's intestate was not guilty of contributory negligence barring a recovery.
5. DEMURRER TO EVIDENCE—*Detached Statement of Witness—Testimony as a whole.*—On a demurrer to the evidence, it is not permissible to take detached statements of a witness for the demurrant, and say that that particular statement is not contradicted by evidence for the demurree, but the statement of the witness must be taken as a whole, and if, when so considered, it cannot be reconciled with the demurree's evidence it must be rejected.

Error to a judgment of the Circuit Court of the city of Norfolk in an action of trespass on the case. Judgment for the plaintiff. Defendant assigns error.

*Affirmed.*

The opinion states the case.

*Hughes & Little*, for the plaintiff in error.

*Brooke & Brooke, Richard McIlwaine, Jr., and J. F. Rutherford*, for the defendant in error.

HARRISON, J., delivered the opinion of the court.

Mrs. Florence I. Holmes and Mrs. Mabel E. Munsell, were killed by an engine of the plaintiff in error on the western end of Main street, in the city of Norfolk, on the night of September 28, 1907, between seven and eight o'clock. The administrators of each of the decedents brought suit to recover damages in the Circuit Court of the city of Norfolk, alleging in each case that

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the deceased came to her death, without fault on her part, as a result of the negligence of the defendant railroad company, and in each case there was a judgment for \$10,000 in favor of the plaintiff, which we are asked to review and reverse.

The evidence being the same, the cases were heard together in this court.

In the case now under consideration, being that of Mrs. Holmes' administrator, there was a demurrer to the evidence, which was overruled by the circuit court and judgment entered in favor of the plaintiff for the damages ascertained by the jury. This action of the circuit court is assigned as error.

A brief statement of the physical conditions and special circumstances surrounding the point of the accident is essential to a clear understanding of the case.

The Merchants and Miners Transportation Company occupies an inclosed yard on the north side of west Main street, in the city of Norfolk, extending from the intersection of that street with Newton street westwardly toward the Bay Line wharf, a distance of about two hundred feet. Beginning at the intersection of Newton and Main streets, and going thence westwardly along the sidewalk on the north side of Main street, the first fifty-five feet of this yard front on Main street is occupied by a building. Proceeding further west, the yard is inclosed by a close fence, nearly seven feet high, in which there are three gates, each about seventeen feet wide. The railroad track of the defendant company forms a "Y" in Mathews street south of its intersection with Main street. The eastern prong of this "Y" crosses Main street and enters the yard through the first gate reached in going west along the north side of Main street, and the western prong of the "Y" crosses Main street and enters the yard through the third gate. It was at this third and last mentioned gate that the accident occurred.

The intersection of Mathews with Main street does not constitute a street crossing, Mathews street running only as far north as the south side of Main street, the north sidewalk of



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Main street being continuous as far down as the wharf at its end. An engine, therefore, coming out of a gate of the yard, passes immediately over the sidewalk on the north side of Main street.

The conditions pointed out show that the place at which the accident happened was one involving peculiar danger to persons going west along the north side of Main street.

A railroad company is bound to exercise care to avoid a collision when its road crosses a public highway, and the greater the danger the greater is the vigilance required.

Viewing the testimony from the standpoint of a demurrer to the evidence, it appears that from Newton street to the place of the accident, a distance of about one hundred and fifty feet, the railroad yard was so obstructed by buildings and fences that a pedestrian on the north side of Main street, going west to the wharf, could not see an engine being operated in the yard and approaching the street on the western prong of the "Y"; nor could the engineer in charge of the engine going out of the yard on the western prong of the "Y" see anyone approaching on the sidewalk from the east and going toward the wharf, there not being space enough between the cab window and the gate post on the eastern side of the gate for him to see a person so approaching.

It further appears that the plaintiff's intestate and her companion were strangers in the city of Norfolk, having never been there before the day they were killed, and only along Main street in the morning as they came from the wharf with friends who met them there. In going west along Main street on their return to the wharf, between seven and eight o'clock at night of the same day, when it was very dark and "drizzly or misty," as they passed the gate through which the western prong of the "Y" ran, an engine of the defendant, with tender in front, moving at the rate of four miles an hour, emerged from the yard upon the sidewalk of the street, colliding with the intestate and her companion, instantly crushing the life out of both and

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scattering their mutilated remains in different directions about the street.

It further appears that the Main street of Norfolk is a populous thoroughfare, and that at the time of the accident, on account of the Jamestown Exposition which was then in progress, it was more than usually traveled. It further appears that the engine, with the tender in front, came from its place of concealment in the yard upon the sidewalk with no light burning, no bell ringing, preceded by no flagman, and without any watchman or warning of any kind to persons who might be passing along the street upon which it was about to enter.

If these facts are to be taken as true, and they must be on a demurrer to the evidence, the negligence of the defendant is beyond question.

It is contended on behalf of the defendant that the circuit court erred, "in admitting evidence of the lack of a flagman or watchman or man on the tender in the absence of proof of an ordinance requiring it."

Several of the counts of the declaration set out a city ordinance providing that whenever a locomotive engine is used within the city of Norfolk, a man shall be required to ride on the front of the locomotive or engine, or on the tender or car in advance of the train as the case may be. And no such locomotive shall be allowed to cross west Main street until a flagman shall have been stationed at the intersection of the railroad with the street to display a flag by day and a light by night, etc., etc.

The theory of the defendant seems to be that, because there was no proof of the alleged ordinance requiring the precautions mentioned, the failure to take such precautions cannot be proven under the other counts of the declaration, as tending to show the defendant's negligence. This position is not tenable.

"Independently of any statute or ordinance on the subject, when a train is backed over a crossing in a frequented street, a lookout must be employed; merely ringing a bell or sounding

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the whistle on the engine, when the train is standing near with its rear to the crossing, is not sufficient warning to passers by of an intention to back the train, and that without other notice the company will be negligent." *Mark's Admr. v. Petersburg R. Co.*, 88 Va. 1, 3, 13 S. E. 299.

Whether or not it is negligence for the servants of a railroad company to run an engine backwards without stationing some one on the tender to signal its approach to a person who may be on the track, is a question which is controlled by the circumstances under which the engine is operated. Under some circumstances, the act is negligence as a matter of law, but in most cases it is a question of fact to be submitted to the jury. *So. Ry. Co. v. Daves*, 108 Va. 378, 61 S. E. 748.

If under the circumstances under which the engine in question was operated, it was negligence for the defendant company to have "no flagman or watchman or man on the tender," then the absence of such precautions may be proven to establish the defendant's negligence, without reference to the existence, pleading or proof of an ordinance on the subject; provided the allegations of the declaration are sufficient to justify the introduction of such evidence.

The counts of the declaration, other than those alleging the ordinance, set out in detail the special peculiarities of the locality and its environments and approaches, by reason of which passengers on the street were obstructed in their view of engines or trains while in the yard and about to move therefrom into Main street; the fifth count alleging that the tracks of the railroad were let into and flush with the pavement of the street, so that persons unfamiliar with the locality passing along the street in the night-time, in the exercise of ordinary care, would not discern their presence.

These, in brief, are the allegations of the circumstances under which the train was operated. These counts then proceed to charge the duties imposed upon the defendant company, under the special circumstances alleged, to be to exercise due and

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reasonable care to keep watch and on the lookout so as to avoid running into and over and injuring persons passing, etc.; and the duty to exercise due and reasonable care to give warning of the approach of the train, by ringing a bell or by taking other means of notification so as to avoid, etc., etc.

These counts do not allege that any particular method or precaution, in exclusion of others, was incumbent upon the defendant in carrying out the duty imposed upon it, but only to exercise due and reasonable care to perform the duty of keeping watch and lookout so as to give warning of its approach, by ringing a bell or *by taking other means of notification*. These counts then allege that the defendant violated its duty and did not exercise due and reasonable care to keep watch and lookout, and to give warning of its approach by ringing a bell or *by taking other means of notification*.

To sustain the alleged violation of these duties, the plaintiff produced evidence that the view of the engineer from his cab was so obstructed that he could not keep watch and lookout; that no light was burning on the tender as it came out in front of the train; that no bell was ringing; that there was no watchman at the crossing; that there was no flagman to warn persons of the approach of the train, and that there was no person riding on the front of the tender which was in front of the engine. These are the ordinary and usual methods adopted for giving notice and warning to persons under the circumstances of this case, and proof that not one of them was employed tends to establish the allegation of the declaration that no warning was given.

The rules of pleading do not require the allegation, in detail, of all the methods of precaution that the defendant might or ought to have taken to give timely warning, under the circumstances here disclosed. The particular duty must be alleged, and its violation must be charged. The duty here is alleged to be "to exercise due and reasonable care to keep watch and lookout and to give warning of the engine's approach;" and the

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violation of this duty is charged. To sustain this charge evidence was admissible to show that there was no flagman, no watchman, no person riding on the front of the engine, that the engineer could not see from his cab, and that no light was burning and no bell ringing. See *Ches. & Ohio Ry. Co. v. Hoffman*, ante, p. 44, 63 S. E. 432, 2 Va. App. 766.

The negligence of the defendant being established by competent testimony, we come to consider, whether the plaintiff's intestate was guilty of contributory negligence.

In this connection it is important to bear in mind the physical environments of the place where the accident occurred. These have been sufficiently described and need not be repeated here. It was a dark, "drizzly" or misty night with the spot badly lighted. The testimony shows that down to the very instant of the accident, when it was too late to escape, the decedent had no notice or warning of the danger that confronted her.

Only two witnesses testified to having seen the accident. One of these, W. Royster, introduced on behalf of the plaintiff, was returning from his work at the wharf, along the north side of Main street. As he neared the point of the accident, he saw the deceased and her unfortunate companion on the sidewalk on the north side of Main street approaching him, and saw both ladies step on the track where it crosses the sidewalk, at the instant that the backing engine emerged from the yard to the sidewalk, and testifies that the engine had gotten possibly four or five feet out of the gate when it struck deceased in the side. The testimony of this witness, that these ladies were on the sidewalk on the north side of the street when they were struck, is borne out by other testimony as to the physical evidences at the point of contact. Two ladies' combs were found immediately after the accident, one in the middle of the sidewalk and one near the grating, just about where Royster saw them struck by the engine. Some brains were also found on the sidewalk and at the grating mentioned. The evidence further tends to show that at the point where this witness locates

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these ladies when struck, there was a dragging, as if some one had been dragged over the surface there.

The testimony to which we have adverted clearly shows, that the deceased was struck while on the sidewalk, and just as she stepped on the track about four or five feet from the gate through which the engine emerged.

This evidence is uncontradicted, except by the testimony of R. L. Burgess, a witness introduced on behalf of the defendant company. This witness, who arrived at the moment, says that he was standing on the corner of Mathews and Main streets, on the south side of the latter, and that he saw two ladies, he supposes the two who were the victims of this accident, *standing* in the middle of Main street between the western prong of the "Y" and its eastern prong; that "they were talking there and one of them said to the other, 'Let's get across the track ahead of the engine,' and one caught her arm into the other's arm;" that he saw the engine coming, and they "sprung" for a run to go across the track, and one had an umbrella hoisted, "and I seen them fall across the track, and I turned my head and walked away. That is all I know about that part of it. I could not swear the engine killed them." This witness further says that the ladies did not run straight across the track, the shortest way, but went diagonally in a northwesterly direction towards the track; recklessly running. This would be, toward the approaching engine, which he says they were trying to avoid.

It is insisted on behalf of the defendant in error, that the remark, "Let's get across the track ahead of the engine," which is attributed to one of these ladies, shows that the deceased had actual knowledge of the proximity of the engine, and that the remark made is a fact not contradicted. This witness does not claim to have heard this remark at any other time or place than while the ladies mentioned were standing together in the middle of Main street. The evidence of the plaintiff shows that the victims of this accident were not, at the time the remark is said

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to have been made, standing together in the middle of Main street, but that they were, at that time, on the northern sidewalk of the street, about the gate through which the engine that killed them passed; the only remark made by them being the exclamation as they were struck, "Oh, Lordy."

All that happened was in a brief moment, and it is hardly possible that these ladies could have been seen standing together in the middle of Main street, saying and doing there the things attributed to them, and at the same time to be where the evidence of the plaintiff places them. The statement of the witness, Burgess, must be taken as a whole; and so considered it cannot be reconciled with the plaintiff's evidence. We cannot sever the remark which he attributes to one of these ladies from its setting, and say that it establishes the contributory negligence of the plaintiff's intestate. Without reference, however, to the rule which rejects the statement of this witness on a demurrer to the evidence, his whole testimony is inherently unsatisfactory, and a jury would have been well warranted in discrediting it, as they did in the companion case of *N. & W. Ry. Co. v. Munsell's Admr.*, *post*, p. 421, 64 S. E. 50, which action on their part was approved by the judgment of the circuit court.

We are of opinion that the record does not sustain the charge that the deceased was guilty of contributory negligence.

Upon the whole case, we find no error in the judgment of the circuit court, and it is affirmed.

*Affirmed.*

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Syllabus.

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**Richmond.**

NORFOLK AND WESTERN RAILWAY CO. v. MUNSELL'S ADMINIS-  
TRATOR.

March 11, 1909.

Absent, Keith, P. and Cardwell, J.

1. RAILROADS—*Grade Crossing—Danger—Admissibility of Evidence—Contributory Negligence.*—The dangerous character of the place at which plaintiff's intestate was killed, and the right, in the absence of any city ordinance, to admit evidence that the defendant did not have a flagman or watchman at the gate, and whether the plaintiff's intestate was negligent in failing to look and see the train, were considered and decided in *Norfolk and W. R. Co. v. Holmes*, ante p. 410.
2. RAILROADS—*Grade Crossing—Instructions—Fanciful Requirements—Partial View of Evidence.*—In an action against a railroad company for negligently killing a person at a grade crossing, an instruction which gives the conditions showing the unusual surroundings and dangerous conditions of the place, and tells the jury if they believe such conditions existed, the defendant was bound to use such precautions as were proper, under the peculiar surroundings and circumstances, in order to give warning of the approach of the train, does not authorize the jury to impose fanciful requirements upon the defendant. Nor is it objectionable as singling out and emphasizing one charge of negligence. If the conditions described existed, it was for the jury to say whether, in view of such conditions, the defendant was negligent.
3. VERDICTS—*Excessive—Contrary to Evidence.*—The verdict for \$10,000. in the case at bar, for negligently causing the death of the plaintiff's intestate, cannot be set aside as excessive, nor because it is contrary to the law and the evidence. See *Norfolk and W. R. Co. v. Holmes*, ante p. 410.



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Statement.

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Error to a judgment of the Circuit Court of the city of Norfolk in an action of trespass on the case. Judgment for the plaintiff for \$10,000. Defendant assigns error.

*Affirmed.*

The evidence is sufficiently set forth in the opinion of the court in *Norfolk & W. R. Co. v. Holmes*, ante, p. 410.

Instruction No. 2. given at the instance of the plaintiff and referred in the opinion of the court is as follows:

"The court instructs the jury, that if they believe from the evidence that the plaintiff's intestate was killed by the defendant's train by the defendant's negligence, and that this was the sole proximate cause of the accident, and that the place of the accident is so situated that a view of a train coming or about to come out of the Merchants and Miners Steamship Company's yard, at the place of the accident, was obstructed by a fence or otherwise to persons walking along the pavement, and crossing or about to cross with the use of ordinary care the track where it crosses the pavement; that the rails of the railroad track coming out of the said yard and crossing the street at that point were laid so nearly flush or even with the surface of the street, or otherwise so obscured from sight, that a person exercising such care as an ordinarily careful person would have exercised under the same circumstances, could not see the track; that it was dark; that the plaintiff's intestate was unfamiliar with the locality, and that the defendant's employees did not use such precautions as were proper under the peculiar surroundings and circumstances of the locality to give warning of the approach of the train; then the fact that the plaintiff's intestate did not look or see the approaching train cannot be considered as contributory negligence."

*Hughes & Little*, for the plaintiff in error.

*Brooke & Brooke, Richard McIlwaine, Jr., and J. F. Rutherford*, for the defendant in error.

## Opinion.

HARRISON, J., delivered the opinion of the court.

This case grows out of the same accident that was the subject of inquiry in the case of *Norfolk & Western Ry. Co. v. Holmes' Admr.*, ante, p. 410, in which an opinion is handed down at the present term of this court.

The plaintiff's intestate and her friend, Mrs. Holmes, were together at the time of the accident, and both were struck and killed at the same moment by the same engine. The testimony in the two cases is the same, and has only been printed in the other case, upon the understanding, however, that it is to be read and considered in this case.

The action brought by Mrs. Holmes' administrator was heard and disposed of upon a demurrer to the evidence. This case was submitted to a jury, upon instructions, and a verdict found for the plaintiff, which the circuit court refused to set aside. The record here contains bills of exception not found in the other record.

Bill of exception No. 1 is to the action of the court in admitting evidence, in the absence of any city ordinance, that the defendant company did not have a flagman or watchman at the gate. This question has been fully discussed and disposed of adversely to the defendant in the case of *Norfolk & W. R. Co. v. Holmes' Admr.*, ante, p. 410, 64 S. E. 46, and what is there said need not be repeated here.

Bill of exceptions No. 2 is taken to the action of the court in giving certain instructions asked for by the plaintiff.

The first instruction is objected to upon the ground that there is nothing in the evidence to show that this was a place of any special danger, or that at the time of the accident there was any crowd in the neighborhood, or anything requiring special precaution. The objection is wholly untenable. The opinion in the Holmes case discusses the evidence sufficiently to show that this instruction was fully justified and could not have misled the jury.

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The second instruction given for the plaintiff is objected to on the same ground as the first, and also for the reason that there was no sufficient testimony upon which to base it, and because of the plaintiff's negligence in failing to look and see the train. These matters are fully discussed and disposed of in the Holmes case, and what is there said can be read in connection with this case.

It is further urged that instruction No. 2 is objectionable because it left the jury blindly to impose fanciful requirements upon the defendant, and singled out and emphasized one charge of negligence.

We find nothing in this instruction to authorize an imposition by the jury of fanciful requirements upon the defendant. The conditions are given which show the unusual surroundings and dangerous condition of the place, and the jury are told that if they believed such conditions existed, the defendant was bound to use such precautions as were proper, under the peculiar surroundings and circumstances, to give warning of the approach of the train. Nor was it objectionable for singling out and emphasizing one charge of negligence. It gave the jury the general conditions, as plaintiff believed them to exist, and said if they believed that such conditions did exist, then unless the defendant, in view of these conditions, used such precautions as were proper, the plaintiff was not guilty of contributory negligence. If the conditions shown in the evidence and described in the instruction existed, it was for the jury to say whether, in view of such conditions, the defendant had used such precautions as were proper for the protection of persons passing on the street when its engine was emerging from the yard.

Bills of exception Nos. 3 and 4, as stated in the petition to this court, are not regarded by the plaintiff in error as of sufficient importance to be emphasized. It is, therefore, unnecessary to prolong this opinion with their consideration.

The fifth and last assignment of error is to the action of the court in refusing to set aside the verdict of the jury.

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The verdict of the jury cannot be disturbed upon the ground that it is excessive, and the discussion in the Holmes case, to which reference is here made, is sufficient to show that the verdict cannot be set aside upon the ground that it is contrary to the law and the evidence.

The judgment complained of must be affirmed.

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Syllabus.

**Richmond.**

NORFOLK AND WESTERN RAILWAY CO. v. BRAME.

March 11, 1909.

1. APPEAL AND ERROR—*Admission of fact—Exclusion of Evidence Tending to Prove Same Fact.*—Where the plaintiff, in an action against a railroad company for an assault and battery upon him by a brakeman, testifies that he was very drunk when he boarded the train, the exclusion of testimony as to his drunken and disorderly condition before boarding the train is not reversible error.
2. CARRIERS—*Railroads—Assault on Passenger by Trainmen—Abusive Language—Respective Rights of Carrier and Passenger.*—It is the duty of those in charge of a passenger train to preserve order and to remove disorderly persons to such safe and convenient place as will prevent annoyance to passengers and trainmen, and it may be to stop the train and eject disorderly persons therefrom, employing only such force as is necessary to accomplish these ends, and overcome any resistance offered; but they have no right to commit any unnecessary violence, and if they do their principal must answer in damages. Insulting words and epithets cannot justify an assault upon a passenger by those in charge of the train, though they may be given in evidence in mitigation of damages. Those in charge of a train have the right to protect themselves against an injury, actual or threatened, and if in so doing, an injury is inflicted upon the passenger under such circumstances that he could not recover damages against the company's servant, neither can he recover against the company. But the evidence must at least show a present injury reasonably to be apprehended, in order that the company may escape liability for an assault and battery upon a passenger by one of those in charge of the train, however abusive may have been the language or reprehensible the conduct of the passenger.

Error to a judgment of the Circuit Court of Henry county

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Statement.

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in an action of trespass on the case. Judgment for the plaintiff. Defendant assigns error.

*Affirmed.*

The opinion states the case. The instructions given by the trial court were as follows:

"A. The court instructs the jury, that those in charge of a passenger train have the right to preserve order, remove disorderly passengers to such safe and convenient places as will prevent annoyance to passengers or trainmen, and even to stop the train and eject such disorderly persons therefrom, but in exercising such right those having charge of such train have only the right to employ such force as may be necessary to accomplish these ends and to overcome any resistance which may be made by such disorderly passengers. They have no right to commit unnecessary violence on an offending passenger, and if they do so their principal must answer in damages.

"B. The court further instructs the jury, that mere insulting words and epithets from an intoxicated passenger will not justify an assault by those in charge of a train, and will not release the carrier from liability for such assault. But insulting words and epithets which provoke an assault must be taken into consideration in mitigation of damages.

"C. The court further instructs the jury, that if they believe from the evidence that Brakeman Hite, acting under the authority of Conductor Johnson, carried the plaintiff into the smoking compartment because of turbulent conduct, and that while in said smoking compartment the said brakeman violently assaulted said Brame and broke his jaw bone and choked him without any further misconduct on the part of said Brame, or without his doing anything which the brakeman could reasonably have construed into an effort or intent to draw a weapon or make an attack on himself, they must find for the plaintiff, and assess his damages at such figures as will compensate him for his physical and mental sufferings and physical injuries oc-

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casioned by such assault, not exceeding the amount of \$2,000, claimed in the declaration.

"I. The jury are instructed that it is the duty of the Norfolk and Western Railway Company, and of the conductors and brakemen on its passenger trains, to use every reasonable means in their power for the comfort and peace of the orderly and well-behaved passengers on such trains, and to prevent profanity and vulgarity in their presence by drunken or disorderly persons, and that in the performance of such duties they not only have the right but it is their duty to use all reasonable means and necessary force to remove from a car in which there are orderly, peaceable and well-behaved passengers, and especially ladies, any passenger who is drunk and acting in a disorderly, profane or vulgar manner.

"II. If the jury believe from the evidence that the plaintiff was upon defendant's train in a drunken condition; that he acted in a disorderly, vulgar and profane manner, cursed the conductor and the brakeman, and entered into a car where a lady and several well-behaved passengers were traveling, and, while in such car, engaged in cursing and profanity, or talked in a loud and boisterous manner, it was the duty of the conductor and brakeman to remove him from the car, and it was their right to use all the force reasonably necessary therefor; that if they believe the conductor and brakeman did remove him by force from the body of the car into the smoking compartment but used no more force than was reasonably necessary, the defendant company is not liable in damages for such removal. And if they believe that after he was so removed he did anything which reasonably caused the brakeman to believe that the plaintiff then and there intended to make an attack upon him with a weapon, or with his fists, the brakeman had the right to do what seemed reasonably to be necessary to protect himself against such apparently threatened attack, whether the same was real or not, provided he believed it was real, and for any injury done the plaintiff by the brakeman in using reason-

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able means to defend himself, the defendant is not liable, and if the jury believe that only such means were used, and believe the other matters as supposed in this instruction, they should find for the defendant.

"III. The jury are instructed that a brakeman or conductor on a railroad train has the same right to protect himself against an assault, or an actual or threatened injury, that any other person has, and that where a brakeman or conductor injures a person in an effort to protect himself, under such circumstances that such person could not recover damages of him, the railroad company is not liable to such persons for the acts of the conductor or brakeman.

"IV. If the jury would not find a verdict for the plaintiff upon the evidence in this case if he were suing the conductor and the brakeman, or either of them, for the injury complained of, they should find for the defendant."

*Phlegar & Powell, Theodore W. Reath and H. G. Mullins,*  
for the plaintiff in error.

*N. E. Smith and Gravely & Gravely,* for the defendant in error.

KEITH. P., delivered the opinion of the court.

This is a suit instituted by William J. Brame to recover damages from the Norfolk and Western Railway Company, on account of injuries received in consequence of an assault made upon him by a brakeman of that road, while a passenger upon one of its trains.

The evidence shows that Brame entered the train of the Norfolk and Western Railway Company in an intoxicated condition. As some of the witnesses express it, he was "violently drunk," and some disagreement having arisen between himself



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and the conductor as to the payment of a cash fare, he not having procured a ticket, he became very disorderly and abusive, using vulgar and profane language, and conducting himself in a manner most insulting to the officials of the train, and offensive to its respectable passengers, one of whom was a lady. Thereupon, the conductor directed the brakeman to remove him from the passenger coach into the smoker, which the brakeman proceeded to do; and while the plaintiff, in his testimony, says that in the process of his removal he was kicked and cuffed and much mishandled, we think it may be taken as established that no greater force was exercised than the occasion justified, until the brakeman followed by the conductor and pushing Brame before him carried him into the smoker, and there, as a passenger states who was in a position to see what occurred, Brame was thrown roughly into a seat. He was still very drunk, and seems to have made some movement of his hand, which the brakeman says he understood to be an effort to draw a weapon from his hip pocket. Whereupon, the brakeman, who is shown to have been a very powerful, active young man, struck Brame upon the jaw, breaking it and loosening a tooth, grasped him by the throat and called upon the conductor to search and disarm him. The conductor did search him, but found no weapon upon his person of any description. A disinterested passenger states that he saw Brame put his hand back toward his hip pocket and as far as his side pocket, "very slowly as if to go after his handkerchief, and said, 'I'll see you later;'" and that thereupon, Hite, the brakeman, "turned and hit him and knocked him against the window sill, and Mr. Johnson searched him."

These are the material facts established by the testimony.

During the course of examination of the witnesses, several exceptions were taken to the rulings of the court, which are now assigned as error. The action of the court in granting and refusing instructions, and in overruling plaintiff in error's motion to set aside the verdict and grant a new trial, are also assigned as error.

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The exceptions to the evidence are to the refusal of the court to permit the defendant to prove that plaintiff had been drinking before he entered the train; that when under the influence of liquor he was quarrelsome; and that he was so disorderly in the store-room of a Mr. Penn during the afternoon of that day that he was requested to leave the store, and arrangements were made to expel him had he not voluntarily left. Another exception is to the action of the court in excluding proof that when the plaintiff applied for a ticket of the station agent he was refused upon the ground that he was too drunk to get on the train. Another exception is to the exclusion of the statement of the witness, Reynolds, that he got upon the train to collect a bill due him by Brame, whereas, Brame had stated in his evidence that Reynolds had gotten upon the train at his invitation.

If it were conceded that, with respect to one or more of these exceptions, the ruling of the court was erroneous, it would not be error for which the judgment complained of should be reversed. If Brame's condition upon the train left any room for controversy or question, it might be that his condition a short time before he entered the train would be of value in enabling the jury to reach a right conclusion as to his condition and his conduct while upon the train; but his own testimony shows, and there is no room to doubt, that he was very drunk; that he was disorderly in his conduct, abusive and insulting to the officers of the train, and used language so indecent and offensive to respectable passengers as justify his removal from the day coach. But the crisis of the situation is reached when, having removed him on account of his gross misconduct to the smoking compartment, the brakeman threw him roughly upon a seat, and struck him a blow which inflicted upon him a serious injury. His removal was justified by his conduct. The company would have been within its rights if he had been ejected from the train. But the question is, was the brakeman justified in making a violent assault upon him?

The abusive language used by Brame, while reprehensible, did not excuse the assault.

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In section 704 of Bishop on Criminal Law, it is said: "No words, however provoking or insulting, or mere verbal threat, will so far justify a blow returned, though in actual passion, as to reduce the killing to the lower degree. It is plain, however, that words may give character to acts; and, in matter of evidence, are admissible to explain them. Hence, if there is a present demonstration of impending violence, which alone would be insufficient, accompanying words, added to the physical acts, may create such peril as will justify the killing of the aggressor, or reduce it to manslaughter."

As it is commonly stated, words do not justify blows, though doubtless insulting language may be shown as extenuating the assault, and in mitigation of the damages sustained.

The turning point in this case is whether or not the insulting language was accompanied by any act to which the words used gave character, and which might reasonably have caused the brakeman to believe that the plaintiff then and there intended to make an attack up him; in which case, of course, he would have had the right to protect himself against such apparently threatened attack, whether the same was real or not.

When we turn to the instructions, we find that they correctly propound the law as applied to the two conflicting views of the evidence presented on behalf of the plaintiff and the defendant.

The jury were told that those in charge of a passenger train have the right to preserve order, to remove disorderly passengers to such safe and convenient place as will prevent annoyance to passengers or trainmen; to stop a train and eject disorderly persons therefrom, employing only such force as may be necessary to accomplish these ends; and to overcome any resistance which may be made by such disorderly passengers; but that the officials of the train have no right to commit unnecessary violence, and if they do their principal must answer in damages; that insulting words and epithets from an intoxicated passenger will not justify an assault by those in charge of the train; but insulting words and epithets which provoke an assault must be

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taken into consideration in mitigation of damages; that a brakeman or conductor on a railroad train has the same right to protect himself against an assault, or an actual or threatened injury, that any other person has, and that where a brakeman or conductor injures a person in an effort to protect himself, under such circumstances that such person could not recover damages of him, the railroad company is not liable to such person for the acts of the conductor or brakeman; and that if the jury would not find a verdict for the plaintiff, if he were suing the conductor and brakeman, or either of them, they must find for the defendant.

These principles are fully sustained by the authorities.

In *Hutchinson on Carriers* (3rd ed.), at section 1093, it is said: "The passenger is entitled not only to every precaution which can be used by the carrier for his personal safety, but also to respectful treatment from him and his servants. From the moment the relation commences, the passenger is, in a great measure, under the protection of the carrier, even from the violent conduct of other passengers, or of strangers who may be temporarily upon his conveyance. But as against the assaults and violence of his servants, the passenger has the right to claim an absolute protection, and the carrier will undoubtedly be held responsible for any unnecessary personal abuse or violence of which they may be guilty in their treatment of the passenger whilst engaged in the discharge of their assigned and appropriate duties, although such abuse may consist in an assault or battery upon the person of the passenger, and may be wholly unauthorized by the carrier and prompted by the vindictive feelings of the servant towards the passenger. And it is undoubtedly well settled law that, when an assault or battery by the carrier's servant occurs upon the carrier's vehicle, the carrier may be held responsible even when the servant has seemingly departed from the line of his duty, and has committed the assault or the personal violence upon the passenger aside from and under circumstances wholly unconnected with the discharge of such duty."

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And at section 1094 it is said: "Passengers on railroad trains are peculiarly under the control of the carrier's agents, and are practically helpless when compelled to defend themselves against their abuse or assaults. It is consequently necessary to hold a railroad company to a strict accountability for any acts of its servants on a train which tend to injure or humiliate the passenger, even though such acts may be malicious and unauthorized. This has been held to be true not only as to conductors, who are in charge of a train, but also as to brakemen."

We have held in *Norfolk & Western Ry. Co. v. Birchfield*, 105 Va. 809, 54 S. E. 879, that, "in case of a threatened assault upon a passenger by a fellow passenger, it is the duty of the company's employees to protect the party threatened from injury, and if they negligently fail to do so, the carrier is liable for the consequences. The conductor has the power, and it is his duty to preserve order on the train; if necessary, stopping the train and calling to his assistance all the train employees and such passengers as are willing to assist him. Until, at least, he has put forth the forces at his disposal, he has no right to abandon the scene of conflict. In order that conductors may be clothed with authority commensurate with their duty, they are in this State made conservators of the peace by Code, 1904, section 1294d, clause 10."

If it be the duty of those in charge of a train to protect passengers from their fellow passengers, how much more is it their duty to exercise self-control and restraint in their own conduct. If mere words will not justify an assault as between those who stand upon a footing of equality and owe no special duty one to the other, how much more true is it as between those in charge of a train and a passenger, who is in a large degree under the control of the carrier's agents, and entitled at their hands to respectful treatment and to protection from all injury. The conduct of a passenger may be exasperating, as it doubtless was in this case. It may render it difficult for the agent of the

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*Opinion.*

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carrier properly to discharge his duty. But this does not excuse or justify his failure to perform it.

Being of opinion that there is no reversible error with respect to the admission or exclusion of testimony, and that the law of the case was properly placed before the jury, it remains to be considered whether or not the verdict is contrary to the evidence.

As we have said, the crisis of the case occurred when the brakeman roughly threw the plaintiff into a seat, after removing him from the day coach. We have seen that the insulting language used by the drunken passenger did not justify the assault, while it was proper for the consideration of the jury in mitigation of damages. The attention of the jury was drawn by the instructions to the two conflicting theories with respect to the evidence at the instant of the assault. Did the brakeman have a reasonable ground to expect that the plaintiff was about to make an attack upon him? The evidence shows that the plaintiff was almost helplessly drunk; that the brakeman, a powerful young man, had without difficulty removed him from one car to another, and placed him roughly in a seat. There is evidence of a movement of the hand on the part of the plaintiff, to his side or hip pocket, but it was accompanied by the statement, "I'll see you later," which would not indicate a present purpose to make an assault. The jury, with their minds specifically drawn to the precise point in issue were of opinion that the brakeman had no reasonable ground to anticipate an attack upon him, and rendered a verdict in favor of the plaintiff, which the court refused to set aside, and we are of opinion that its judgment should be affirmed.

*Affirmed.*

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Opinion.

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**Richmond.**

OWENS v. OWENS' EXECUTOR.

March 11, 1909.

Absent, Keith, P. and Cardwell, J.

1. APPEAL AND ERROR—*Executors and Administrators—Ex Parte Settlements of Fiduciary Accounts—Ruling on Exceptions.*—No appeal lies to this court from an order of an inferior court merely overruling exceptions and confirming a commissioner's report of an *ex parte* settlement of an executor's account. The remedy is by a bill to surcharge and falsify the *ex parte* settlement. Until surcharged and falsified it is to be taken as *prima facie* correct, and an order of this court affirming the order of the inferior court would not make it any more final than it was before the appeal was taken.

Appeal from an order of the Chancery Court of the city of Richmond overruling an exception to an *ex parte* settlement of the accounts of an executor. Executor appeals.

*Appeal Dismissed.*

The opinion states the case.

*James Lewis Anderson*, for the appellant.

*Christian, Gordon & Christian*, for the appellee.

HARRISON, J., delivered the opinion of the court.

The will of Otho O. Owens was admitted to probate in the Chancery Court of the city of Richmond on June 12, 1906, and

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on the same day the Virginia Trust Company, the executor named therein, qualified as such. A copy of the will is filed with the record, which shows that, after a number of legacies mentioned, the residue of the estate was given to Mrs. Mozelle Owens, the wife of the testator, for life, with remainder at her death to the Union Theological Seminary.

On the 29th of October, 1907, a settlement of the executorial accounts, made by the commissioner of accounts, was filed in the clerk's office of the chancery court. The widow of the testator excepted to this report upon the ground that certain allowances to the executor in the form of commissions were improper.

Upon consideration of this exception by the chancery court, as provided by section 2698 of the Code, the same was overruled, and the report confirmed. From this action of the chancery court, this appeal was taken.

The first question to be determined is whether or not this court has jurisdiction to entertain an appeal from the order here complained of.

Appellant cites as sustaining her right of appeal, the case of *Triplett's Exors. v. Jameson*, 2 Munf. 242, decided in 1811, and *Farneyhough's Ex'or. v. Dickerson*, 2 Rob. 607, decided in 1843. The law regulating appeals has, since these cases were decided, undergone such changes as to leave them without weight in determining the question at issue. The statutory law as it now exists contains no provision by which this court can review, by appeal therefrom, the order of the chancery court merely overruling an exception and confirming a commissioner's report of an *ex parte* settlement of an executor's accounts.

Chapter 121 of the Code, concerning fiduciaries, requires the court, or the judge thereof in vacation, to examine *ex parte* fiduciary accounts filed in the clerk's office, correct any errors that may appear, and confirm the report as a whole or in a qualified manner.



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Section 2699 provides that "the report, to the extent to which it may be confirmed, shall be taken to be correct, except so far as the same may, in a suit, in proper time, be surcharged or falsified."

This section negatives the idea of an appeal from the order confirming the *ex parte* settlement, and clearly points out the remedy to be pursued by a party who thinks himself aggrieved by an *ex parte* settlement of a fiduciary account. When a bill is filed to surcharge or falsify the accounts, all concerned are made parties and have an opportunity to take evidence and defend their rights, and an appeal can be taken by any one aggrieved from a final decree in the cause adjudicating the matters in issue.

The present proceeding is not a suit between parties plaintiff and defendant. The settlement, when confirmed, is merely an *ex parte* proceeding, to be taken as *prima facie* correct, but subject to be surcharged and falsified by a bill filed for that purpose, as provided by statute. Such a settlement is mere matter of evidence until surcharged and falsified, and to the extent that it is surcharged or falsified, the settlement becomes valueless even as evidence, and the liability of the executor is precisely the same as if the settlement had never been made. *Leake's Ex'or. v. Leake*, 75 Va. 792; *Haught v. Parks*, 30 W. Va. 246, 4 S. E. 276.

Until surcharged and falsified in the manner indicated by statute, the *ex parte* settlement, although confirmed by the order of the court, is mere matter of evidence, and an order of this court affirming the order of the chancery court would not make the *ex parte* settlement any more final than it was before the appeal was taken. It could still be questioned by a bill to surcharge and falsify; so that an appeal from such an order would be barren of results.

It is further apparent that if the contention of appellant be sound, that she has the right to appeal from the order in question, there could be a succession of appeals from the same order

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assailing this *ex parte* settlement; for every person interested in it would have the same right of appeal that appellant has. The ample and complete remedy in such cases is, as indicated in section 2699, by filing a bill to surcharge and falsify the *ex parte* settlement, in which the rights of all parties can be finally adjudicated.

It is clear that this appeal must be dismissed as improvidently awarded.

*Dismissed.*

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Statement

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**Richmond.**

## PHILLIPS v. SOUTHERN RAILWAY CO.

March 11, 1909.

Absent, Keith, P., and Cardwell, J.

1. RAILROADS—*Negligent Fires—Burden of Proof—Presumption.*—In an action against a railroad company to recover damages for fire set out by its engines, the burden is on the plaintiff to show that the fire originated from sparks emitted by an engine of the defendant. This being shown, the company is presumptively charged with negligence, and it must assume the burden of proving that its engine was equipped with the best mechanical appliance in known and practical use for preventing the escape of sparks, that the engine was kept in proper condition and repair to prevent the undue emission of sparks, and was properly managed; and, if the fire began on the defendant's right of way, that it kept its right of way clear of combustible material liable to ignition by sparks or coals of fire discharged from passing engines, thereby communicating fire to the property of others.
2. DEMURRER TO EVIDENCE—*When to be Decided for Demurree.*—Where the evidence is such that a jury would have been warranted in finding a verdict for the demurree to the evidence, the court must so find.

Error to a judgment of the Circuit Court of Chesterfield county in an action of trespass on the case. Judgment for the defendant. Plaintiff assigns error.

*Reversed.*

The opinion states the case.

*Hunsdon Cary and Beverly T. Crump*, for the plaintiff in error.

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*Munford, Hunton, Williams & Anderson*, for the defendant in error.

HARRISON, J., delivered the opinion of the court.

This action was brought to recover of the defendant company damages for its alleged negligence in communicating fire from one of its engines to the woodland of the plaintiff, whereby a large and valuable body of timber was destroyed.

The company demurred to the evidence, and the case is before us upon a writ of error to the judgment of the circuit court sustaining the demurrer and dismissing the case.

The law in this class of cases is well settled. The burden of proving that the fire originated from sparks emitted by an engine of the railroad company is upon the plaintiff. Where the origin of the fire is thus fixed upon the company, it is presumptively charged with negligence, and must assume the burden of proving that its engine was equipped with the best mechanical appliance in known and practical use for preventing the escape of sparks; that the engine was kept in proper condition and repair to prevent the undue emission of sparks, and was properly managed; and that it kept its right of way clear of combustible material liable to ignition by sparks or coals of fire discharged from passing engines, thereby communicating fire to the property of others, etc. *Patterson v. C. & O. Ry. Co.*, 94 Va. 16, 26 S. E. 393; *White v. N. Y. & C. R. Co.*, 99 Va. 357, 38 S. E. 190; *N. & W. Ry. Co. v. Fritts*, 103 Va. 687, 49 S. E. 971, 106 Am. St. Rep. 611, 68 L. R. A. 864; *Atlantic Coast Line R. Co. v. Watkins*, 104 Va. 154, 51 S. E. 172.

The woodland of the plaintiff was situated on the line of the defendant between the stations Robious and Midlothian. The evidence tends very clearly to connect the fire with a passing engine of the defendant. It tends to show that the fire which destroyed the plaintiff's property originated on the morning of March 23, 1907, about the time a local freight of the defendant,

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drawn by engine No. 195, passed. The evidence further tends to show that the spark arrester on this engine was out of repair, and the engine in a condition to throw sparks, and was throwing them, in unusual quantities about the time the fire originated. It further tends to show that the fire originated on the defendant's right of way; that the train in question was behind time, and running greatly in excess of its schedule rate through a heavily wooded country, where fire was likely to occur, at a very dry season and on a very windy day, and at a point where the engine was put to unusual exertion.

A detailed review of the evidence in this case is not necessary. It is enough to say, that upon the evidence and the inferences to be properly drawn therefrom, the jury would have been well warranted in finding for the plaintiff. This being so, on a demurrer to the evidence, we must so find.

The judgment complained of must, therefore, be reversed, and this court will enter judgment in favor of the plaintiff in error for the sum ascertained by the jury as compensation for the damage sustained by him.

*Reversed.*

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Statement.

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**Richmond.**

PEOPLES PLEASURE PARK COMPANY (INC.) AND OTHERS v.  
ROHLEDER.

June 11, 1908.

REHEARING.

March 11, 1909.

1. COVENANTS—*Restrictive Provisions—Vesting in "Colored" Persons—Corporations.*—A restriction in the conveyance of land to the effect that "the title of this land is never to vest in a person or persons of African decent," or "colored persons" is not violated by a subsequent conveyance of the land to a corporation, organized "to establish and develop a pleasure park for the amusement of colored people." The contemplated use is not prohibited by the restriction nor is the title conveyed to a forbidden person. A corporation is an artificial being totally distinct from its stockholders and directors.
2. DEEDS—*Conditions Subsequent—Construction.*—Conditions subsequent are not favored in law, because they tend to destroy estates, and a party who insists upon a forfeiture for a breach of such a condition must bring himself clearly within the condition.

Appeal from a decree of the Circuit Court of Henrico county.  
Decree for complainant. Defendants appeal.

*Reversed.*

The opinion states the case.

*Smith, Moncure & Gordon*, for the appellants.

*Samuel A. Anderson* and *George C. Gregory*, for the appellee.

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Opinion.

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CARDWELL, J., delivered the opinion of the court.

Appellee filed her bill against appellants, the purposes thereof being to annul a conveyance of certain lands located in Henrico county, and known as Fulton Park, to appellant, Peoples Pleasure Park Co., Inc., from its co-appellants, Ida M. Butts and D. G. Fulton, and perpetually to enjoin and restrain the Peoples Pleasure Park Co., Inc., from selling or otherwise disposing of the said property, or any part thereof, to colored persons for any purpose whatsoever, or to any person for the purpose of using the same as a public park or place of amusement for colored persons.

It is averred that in the year 1900, Bliss Black and wife acquired from the heirs of one Samuel Mosby, deceased, title to a tract of about one hundred and twenty-five acres of land in Henrico county, near Fair Oaks station, at the junction of the Southern Railway with the electric railway running from Richmond city to Seven Pines, and platted the same, under the name of Fulton Park, into 1330 lots, recording a small part of the plat—105 lots—in Henrico county clerk's office; that between the date of said purchase and the beginning of the controversy out of which this litigation arises, there were a number of conveyances of said tract of land (except the small number of lots that had been sold therefrom), but these conveyances were to parties who either represented the Blacks, or were identical in interest with them; that it was the original intention of the Blacks to establish a settlement of white persons at Fulton Park, and representations were made to that effect by them, both in oral statement when trying to sell lots, and in published advertisements of the lots for sale in newspapers, in printed handbills posted, etc.; that about thirty, only, of the lots were sold by the Blacks or their associates, of three of which, with a small dwelling thereon, appellee, on October 5, 1904, became the owner, having purchased the same for a home from Harriet J. Powers, who took from Ida N. Butts during the time that the

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latter held title to all the lots in Fulton Park, except such of them as had been previously sold and conveyed by her or the Blacks; that in the deed to Harriet J. Powers, appellees' grantor, there was the covenant, condition or stipulation in these words: "The title to this land never to vest in a person or persons of African descent;" and the deed to appellee was made subject to the limitations and restrictions contained in the deed to Harriet J. Powers.

It is further averred, that after the title to the remaining land (Fulton Park) had again been acquired by Black and wife, they conveyed it as a whole to the Revere Beach County Fair and Musical Railway Co., excepting the lots previously sold, and in this conveyance is the covenant, condition and stipulation: "The title to this land never to vest in a colored person or persons;" that afterwards the Revere Beach Fair and Musical Railway Co., transferred the property to one Jessie M. Smith, providing in the deed that the same should be subject to the covenant, condition or stipulation imposed thereon by Black in his deed to the company; that after Jessie M. Smith had held the property a few months she transferred the title thereto by a conveyance from herself as an individual to herself as trustee, without specifying the nature of the trust or naming the beneficiary or beneficiaries thereof and omitting mention of the "covenant, condition or stipulation" under which she had held the property, as an individual; that Jessie M. Smith, as trustee, but without disclosing the nature of the trust or the beneficiary or beneficiaries thereof, conveyed the property again to Ida M. Butts, trustee, making no mention of a restriction upon the latter's power to alienate the property, or as to whom she might convey it; and that on or about May 3, 1906, a deed was recorded in the clerk's office of Henrico county, by which all the unsold portion of Fulton Park was conveyed by Ida M. Butts to one D. G. Fulton, who by deed recorded in the same office, on the same day, conveyed the property to appellant, Peoples Pleasure Park Co., Inc.



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The bill then charges that the Peoples Pleasure Park Co. is a corporation composed exclusively of negroes, and that this corporation purchased Fulton Park for the express purpose of converting the same into a park or place of amusement for colored people; that the corporation, before it purchased the property, was fully apprised of the "condition, covenant or stipulation" theretofore in the bill mentioned as having been incorporated in the deed conveying the property to the Revere Beach County Fair and Musical Railway Co., and also aware of the pendency of injunction proceedings to prevent said appellant from acquiring title to Fulton Park.

It will be observed, therefore, that appellee rests her right to the relief she seeks upon the ground that the "covenant, condition or stipulation" repeatedly mentioned is a covenant real running with the land, made for the protection of each and every person who became the owner of a lot in Fulton Park. In other words, the gravamen of her bill is that the restriction in the deed to her immediate grantor, and in other deeds made by Black and wife, or their associates, to other grantees, none of which were signed by the grantees, that the title to the lot or lots conveyed should never vest in "a person or persons of African descent" or "colored persons," was made applicable to each and every lot in Fulton Park, and a property right of each individual owner of a lot; whereby appellee is entitled to have the court, in the exercise of its equitable jurisdiction, declare the conveyance of the residue of the Fulton Park land to the Peoples Pleasure Park Co., Inc., null and void, and the title to the property it purports to convey forfeited.

Accordingly, the prayer of the bill is that the alleged contract or agreement made by Black and wife, that the whole of the property known as Fulton Park should be limited exclusively to the occupancy, use and ownership of white persons, be enforced, and to that end the deed from D. G. Fulton to appellant, Peoples Pleasure Park Co., Inc., be declared null and void and of no effect; that the Peoples Pleasure Park Co., Inc.,

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its agents, etc., be enjoined and restrained from selling or otherwise disposing of the property (Fulton Park), or any part thereof, to colored persons for any purpose whatever, or to any person for the purpose of using the same as a public park or place of amusement for colored persons, etc.

Upon the hearing of the cause on the bill, the demurrers and answers of appellants thereto, the exhibits filed with the pleadings, and the depositions of witnesses, the circuit court overruled the demurrers, and by its decree under review held, that the restriction on alienation of the lands in the Fulton Park tract, relied on by appellee, was repugnant to the grant in the deeds containing the restriction, was an unreasonable restraint on alienation, was contrary to public policy and, therefore, null and void; but, after reciting that appellee had been misled in the purchase of her three lots in Fulton Park, decreed that appellants pay to her the market value of her property, as a condition to having the temporary injunction awarded in the cause dissolved; and that, as appellants would not then consent to do that, the injunction be perpetuated with costs to appellee.

The first question, and, in the view this court takes of the case, the only question, requiring consideration is whether or not the circuit court erred in overruling the demurrer of appellants to appellee's bill.

Bliss Black and wife, who formerly owned the Fulton Park land, and who, it is alleged, made public, in the manner mentioned, their purpose and determination that no portion of the land should be sold to colored people, but would be exclusively and permanently devoted to the use, occupancy and possession of white people, are not even made parties to the bill. But if this had been done, and it were conceded that the restriction on alienation to a person or persons of African descent contained in the deed to appellee's immediate grantor and to others, from Black and wife or their associates, is not an unreasonable restraint on alienation and not contrary to public policy, as to which it is not necessary that we express an opinion, has this

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restriction been violated by the conveyance which appellee seeks to have declared null and void?

The deeds exhibited with the bill, conveying lots in Fulton Park to individual purchasers, and the deed of the residue of the land to the Revere Beach County Fair and Musical Railway Co., were conveyances in fee-simple with general warranty and all the usual covenants of title; and between the grant of a fee-simple estate, followed by a description of the property, and the covenants of title, appears this language: "Subject to the following restrictions: the title to this land never to vest in a person or persons of African descent," or "colored person." If the conveyance to appellant corporation, Peoples Pleasure Park Co., was not a conveyance to "a person or persons of African descent" or "colored persons," it is clear that the bill is fatally defective on demurrer, since the parol conditions upon which appellee alleges she bought her lots cannot be engrafted on the deed containing the restriction. Dev. on Deeds, sec. 976. Even if the restriction could be construed as a covenant on the part of the grantors, still the covenant could not be extended by implication, but it is limited by its very terms to a prohibition against the vesting of the title in "a person or persons of African descent," or "colored persons," nothing being said as to the use of the property.

It is well settled that conditions subsequent are not favored in law, because they tend to destroy estates. When relied upon to work a forfeiture, they must be created by express terms, or clear implication, and are strictly construed. *King v. N. & W. R. Co.*, 99 Va. 625, 39 S. E. 701; *N. Y. Indians v. United States*, 170 U. S. 1, 42 L. Ed. 927, 18 Sup. Ct. 531; Dev. on Deeds, sec. 959.

"Nothing is better settled than that in conditions subsequent, since they are in defeasance of interests already vested, courts of law and courts of equity are strict in requiring the *very event*, or the act to be done, with all its particulars, which is to defeat the interests previously vested. \* \* \* As was said by Lord

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Alvanly, 5 Vesey's Rep. 209, 'Where there are clear words of gift, creating a vested interest, the court will never permit the absolute gift to be defeated, unless it be perfectly clear that the very case has happened in which it is declared that the interest shall not arise.'" *Lewis v. Henry*, 28 Gratt. 192-203. See also *Alex. & Wash. R. Co. v. Chew*, 27 Gratt. 547; *Wolverton v. Hoffman*, 104 Va. 605, 52 S. E. 176.

The foregoing rule is applied where a grantor or his heirs are seeking to take advantage of a breach of a condition subsequent, and *a fortiori* is the rule to be applied where its benefits are invoked by one not a party to the deed or conveyance containing the condition.

"A condition cannot be extended beyond its terms, and a party who insists upon a forfeiture of an estate for a breach of a condition must bring himself clearly within the terms of the condition." Dev. on Deeds, sec. 973 and note.

Aside from the question, whether or not appellee could obtain the relief she asks against appellants—that is, an annulment of the conveyance to appellant, Peoples Pleasure Park Co., Inc.—on the ground that the restriction on the right of alienation of any of the Fulton Park land to "a person or persons of African descent" or "colored person" had been violated by a sale of a part of the land to said appellant, the bill fails to allege facts showing a violation of the restriction, and should have been dismissed upon the demurrers thereto. Such a conveyance, by no rule of construction, vests the title to the property conveyed in "a person or persons of African descent." Although a copy of the charter of the grantee is filed as an exhibit with the bill and made a part thereof, and which sets out that the object for which the corporation is formed is "to establish and develop a pleasure park for the amusement of colored people," a contemplated sale of the property to "a person or persons of African descent" is not even alleged, but only a contemplated use of the property as a place of amusement for colored persons, which the restriction relied on neither expressly, nor by implication, prohibits.

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"A corporation is an artificial person, like the State. It has a distinct existence—an existence separate from that of its stockholders and directors." I Cook on Corp. (4th ed.), sec. 1.

Professor Rudolph Sohm, in his *Institutes of Roman Law*, pp. 104-106, says: "In Roman law, the property of the corporation is the sole property of the collective whole; and the debts of a corporation are the sole debts of the collective whole. \* \* \* It represents a kind of ideal private person, an independent subject capable of holding property, totally distinct from all previously existing persons, including its own members. It possesses, as such, rights and liabilities of its own. It leads its own life, as it were, quite unaffected by any change of members. It stands apart as a separate subject or proprietary capacity, and, in contemplation of law, as a stranger to its own members. The collective whole, as such, can hold property; its property, therefore, is, as far as its members are concerned, another's property, its debts another's debts. \* \* \* Roman law contrived to accomplish a veritable masterpiece of juristic ingenuity in discovering the notion of a collective person; in clearly grasping and distinguishing from its members the collective whole as the ideal unity of the members bound together by the corporate constitution; in raising this whole to the rank of a person (a juristic person, namely), and in securing it a place in private law as an independent subject of proprietary capacity standing on the same footing as other private persons."

Marshall, C. J., in the *Dartmouth College Case*, 4 Wheat. 518, 4 L. Ed. 629, defined a corporation as, "an artificial being, invisible, intangible, and existing only in contemplation of law."

In Green's *Brice, Ultra Vires* (2nd Am. ed.), secs. 1, 2, it is said, that "a corporation is a person which exists in contemplation of law only, and not physically."

The same author, in commenting on Kyd's definition, says: "But sufficient stress is not laid upon that which is its real

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characteristic in the eye of the law, viz., its existence separate and distinct from the individual or individuals composing it. \* \* \* This is the one important fact. The members of a corporation aggregate, and the one individual who is constituted a corporation sole, may, from their connection with such, have rights and privileges, and be under obligations and duties, over and above those affecting them in their private capacity; but they get them by reflection, as it were, from the corporation. They individually are not the corporation—cannot exercise the corporate powers, enforce the corporate rights, or be responsible for the corporate acts.”

In *Stewart & Palmer v. Thornton*, 75 Va. 215, the syllabus of the case is as follows: “The county school boards are, by act of assembly, constituted a corporation, and a suit to recover a fund belonging to the corporation must be brought in its corporate name. A suit by persons styling themselves the directors of the county school board of their county cannot be maintained.” In the opinion by Burks, J., referring to the rule that a corporation must sue and be sued by its corporate name, it is said: “Like a natural person ‘it is recognized in law only by its name, and in its corporate capacity, rights and liabilities, it is as distinct from the persons composing it as an incorporated city is from an inhabitant of the city.’” Further recognizing the corporation as a legal entity, distinct from the persons composing it, the opinion in that case, quotes from Judge Denio, in *People v. Fulton*, 11 N. Y. Rep. 94, as follows: “Incorporated religious societies are aggregate corporations, and whatever property they acquire, whether it be real or personal, is vested in interest in the body corporate; and while the officers have it under their control or dominion, whatever possession they have is the possession of the artificial person whose agents they are. Although called trustees, they do not hold the property in trust for the corporation or the religious society. The name is simply the title of their office, and their position respecting the corporate property would be the same if they were denomi-

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nated directors or managers. Their right to intermeddle is an authority, and not an estate, or title. They have no other possession than the directors of a bank have of the banking house. This would be so *upon general principles relating to the legal nature of corporations*, apart from the particular language of the act concerning religious corporations."

For the above reasons, we are of opinion that the decree complained of is erroneous, and it will be set aside and annulled, the demurrers of appellants to the bill sustained, and the bill dismissed with costs to the appellants.

On rehearing March 11, 1909.

BUCHANAN, J.:

A decree was rendered in this cause on the 11th day of June, 1908, which upon a petition to rehear was set aside.

Upon a careful consideration of the case upon the rehearing, we find no occasion to depart from the conclusion reached upon the original hearing.

For the reasons given, and upon the authorities cited in the opinion then delivered, the decree entered at that time is approved and will be adhered to.

*Reversed.*

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**Richmond.**

**ROLLEY v. ROLLEY'S EXECUTRIX AND OTHERS.**

March 11, 1909.

Absent, Cardwell, J.

1. WILLS—*Devise for Life With Power to Consume Fee—Repugnancy.*—A devise and bequest by a husband to his wife of all his property to be used and enjoyed by her during her life or widowhood, in such quantities as may be requisite for her comfortable maintenance, vests in the wife a fee simple estate in the real property and an absolute estate in the personalty, and a limitation over to any one of any estate in the property so devised and bequeathed is void for repugnancy and uncertainty.

Appeal from a decree of the Circuit Court of Northampton county. Decree for defendants. Complainant appeals.

*Reversed.*

The opinion states the case.

*Kendall & Daniel*, for the appellant.

*Otho F. Mears*, for the appellees.

KEITH, P., delivered the opinion of the court.

The bill in this case calls for the construction of certain clauses of the will of William S. Rolley.

"Secondly, I desire and direct that at the time of my decease. all the property of every kind, real, personal and mixed,



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of which I may at that time be seized and possessed, shall pass into the possession of my beloved wife, Mary A. Rolley, and so remain, to be used and enjoyed by her, in such quantities as may be requisite for her comfortable maintenance, so long as she shall remain my widow, and hence, to that end and extent only, I do hereby give and bequeath the same to her, my said beloved wife Mary A. Rolley.

“Thirdly, And I furthermore desire and direct that, at such time as my said beloved wife, Mary A. Rolley, shall cease to be my widow, all of the property received by her hereunder, which shall then be unconsumed, shall then pass to and become the property of my beloved daughter, Elizabeth B. Rolley, for the term of her natural life, provided, however, that she, my said beloved daughter shall not live to attain the age of twenty-one years, and hence, subject to the foregoing provisions and to the extent aforesaid, I do give and bequeath the said property to her, my said beloved daughter, Elizabeth B. Rolley.

“Fourthly, And I do furthermore desire and direct, that if my said beloved wife, Mary A. Rolley, shall at any time cease to remain my widow, thereby causing the property hereinbefore disposed of to pass as aforesaid unto the said Elizabeth B. Rolley, and the said Elizabeth B. Rolley shall not live to attain the age of twenty-one years that, at the death of the said Elizabeth B. Rolley, all the property so passing to her as aforesaid, shall then revert unto the said Mary A. Rolley, whether at such time she be my widow or not, absolutely and in fee simple.

“Fifthly, And I do furthermore desire and direct, that if the said property hereinbefore disposed of shall by any provision of this my last will and testament pass into the possession of my said beloved daughter, Elizabeth B. Rolley, and she, the said Elizabeth B. Rolley, shall live to attain the age of twenty-one years, that upon her so arriving at age, all of the said property shall then become hers, in fee simple and absolutely, and hence, to the extent named in this and the fourth section or paragraph of this my last will and testament, and subject

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to the provisions therein contained, I do give and bequeath all the said property."

By the sixth and seventh clauses of the will, he appoints his wife the guardian of his daughter and the executrix of his estate.

The circuit court was of opinion that under this will the widow took an estate in all the property, real and personal, for life, or during widowhood, with remainder over to Elizabeth B. Rolley in defeasible fee, contingent upon the latter's death during infancy, the said property to pass, in the event of such contingency, to the said Mary A. Rolley, in fee simple.

As is said in the petition for appeal, this is one of many cases where the testator has sought to bestow upon the beneficiary of his bounty an estate with the attributes of a fee simple, or authority to consume it, and yet provide that if the beneficiary shall fail to exercise such authority, the property shall go over to another.

In *Farish v. Wayman*, 91 Va. 430, 21 S. E. 810, after considering a number of authorities, Judge Harrison, speaking for this court, says: "The cases cited clearly establish that whenever it is the intention of the testator that the devisee shall have an unrestrained power of disposition over the property devised, whether such intention be expressed or necessarily implied, a limitation over to another is void, because it is inconsistent with, and repugnant to, the estate given to the first devisee, although the will shows that it was the testator's intention, in respect to the property given to the first taker, that 'what may remain of the same,' or 'whatever may remain at his death,' or 'so much thereof as may be in existence at his death,' or 'such part as he may not appropriate,' or 'what may be on hand at his death,' should go to another. Such intention must fail on account of its uncertainty, and the first taker acquires the absolute property."

In *Brown v. Strother*, 102 Va. 145, 47 S. E. 236, the testator gave to "William and Effie, my brother and sister, all I

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possess on earth for their support, to be used in no other way, and I hereby appoint Thadeus Hatcher my trustee, without security, to see that it is judiciously used. On no occasion are they to have any part of it while they remain on this farm, and if there is any left after their death, I give to J. Homer Mock and Lucy V. Mock fifty dollars apiece, and I give all that is over to the youngest child of the late Edward Brown." In this case, not only was there a devise over to another of what was left after the death of the first takers, but a trustee was appointed to see that what was given to his brother and sister for their support was judiciously used by them for that purpose. But the court was of opinion that there was an implied power to consume the entire estate, and the limitations over were held void for repugnancy and uncertainty.

These cases and the authorities upon which they rest seem to control the construction of the will under consideration. The testator bequeathed all of his property of every kind to Mary A. Rolley, to be used and enjoyed by her during her life or widowhood, in such quantities as might be requisite for her comfortable maintenance. It is subjected to her uncontrolled discretion, to be used and enjoyed for her comfortable maintenance as she may see fit; and this language, under the authorities cited, clothes her with an unrestrained power of disposition over the property devised.

This view is strengthened by the language of the third clause, where it is provided that when "my beloved wife, Mary A. Rolley, shall cease to be my widow, all of the property received by her hereunder, which shall then be unconsumed, shall pass and become the property of my beloved daughter \* \* \*."

For these reasons, we are of opinion, that by the will of the testator his widow took an absolute estate in the personalty and a fee simple in the realty.

The decree of the circuit court is therefore reversed.

*Reversed.*

## Syllabus.

**Richmond.****SMITH'S ADMINISTRATOR v. NORFOLK AND PORTSMOUTH TRAC-  
TION Co.**

March 11, 1909.

Absent, Keith, P.

**MASTER AND SERVANT—Street Railways—Personal Injury to Servant—Notice of Danger—Knowledge—Question for Jury.**—The fact that a conductor of a street car, who was killed by being struck by a freight car standing on a siding of the company in close proximity to the main line, had passed this car before the accident, did not charge him with knowledge of its dangerous proximity to the main line. Mere knowledge that a freight was sometimes on the track at that point did not charge him with knowledge of its dangerous proximity. Whether he knew of such proximity was a question of fact for the jury. He could not be held to know it as a matter of law, and an instruction so declaring is erroneous. In order to charge a servant with notice of a defect and danger, it must be unquestionably clear and plain, so that if he did not see it, he must necessarily have been in fault.

**MASTER AND SERVANT—Street Railways—Injury of Conductor—Contributory Negligence—Ordinary Care—Measure of Duty.**—Negligence consists of the failure, under the circumstances, to exercise ordinary care, and the only difference between negligence of a plaintiff and of a defendant is that the former is called contributory negligence. To declare that if a street car conductor could have performed his duties and still have avoided the injury of which he complains he cannot recover is to require of him a higher degree of care than the law imposes. Perfection of attention to surroundings, while the mind is concentrated on a particular duty, is not required. The law only requires the exercise of reasonable or ordinary care—such care as reasonably prudent men would exercise for their safety under like circumstances.

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Opinion.

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Error to a judgment of the Law and Chancery Court of the city of Norfolk in an action of trespass on the case. Judgment for the defendant. Plaintiff assigns error.

*Reversed.*

The opinion states the case.

*Daniel Coleman and Nathaniel T. Green*, for the plaintiff in error.

*Williams & Tunstall and Henry W. Anderson*, for the defendant in error.

HARRISON, J., delivered the opinion of the court.

This action was brought by the administrator of A. L. Smith, deceased, to recover of the Norfolk and Portsmouth Traction Company damages for its alleged negligent killing of the plaintiff's intestate. There was a verdict and judgment in favor of the defendant, which this writ of error brings before us for review.

The defendant company operates an electric railroad between Norfolk city, Ocean View and Willoughby Spit, carrying thereon both freight and passengers. The plaintiff's intestate was in the employment of the company in the capacity of conductor on one of its passenger cars. The deceased had been in the employment of the company as a regular conductor for about eighteen days, and had been operating cars of the size and kind he was on when killed for only six days previous to the injury which resulted in his death.

The car on which the deceased was conductor at the time of the accident was an open electric car, with seats running across the car and a board running along the whole length of the car on the outside, for the use of persons getting on and off the car, and for the use of the conductor in the collection of fares. The

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line of the defendant passed near Ocean View, where the company had a freight house in front of which was standing, at the time of the accident, one of its freight cars.

On the 5th day of July, 1907, the deceased was in charge of a car which was coming from Willoughby Spit to Ocean View, and as he approached the latter point was standing on the running-board of his car, in the discharge of his duty as conductor collecting fares, and was caught between the car upon which he was conductor and the freight car of the company, which was standing on a practically parallel track, thereby receiving the injuries which resulted in his death.

The gravamen of the declaration is that it was the duty of the defendant company to use due and ordinary care to provide a reasonably safe place for the deceased to work in while in the discharge of his duty as conductor, so as to protect him from being struck by cars standing upon its side-tracks; but that the defendant, disregarding this duty, had carelessly and negligently left standing upon its side-track near Ocean View a freight car of such dimensions that plaintiff's intestate could not safely pass it while on the running-board of his own car collecting fares; the proximity of the freight car being unknown to the deceased.

As already seen, the plaintiff's intestate had been operating the car upon which he was killed for only six days, and the uncontradicted evidence shows that the freight car was not always on the track in question, being there only from 8:30 A. M. to 10:30 A. M. and from about 6 P. M. to 7:30 P. M. of each day.

On the trial of the case, the court, at the instance of the defendant, and over the objection of the plaintiff, gave the following instruction: "If the jury believe from the evidence that the plaintiff's intestate came to his death by being struck by a freight car of the defendant on a track parallel, or approximately parallel, to that upon which his car was running, and if they further believe that the said intestate had, for several days

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prior to the said accident, passed the said freight car in the day time while it was standing in substantially the same position upon the said side track, and while the said intestate was riding as a conductor upon a car of the same size as that upon which he was riding at the time of the accident, then the law presumes that the said intestate knew of the proximity of the said car to the track, if the said car was in the said position at the time; and if the jury further believe that the said intestate could have preformed his duties as conductor, and still have avoided being struck by the said car, then the said intestate was guilty of contributory negligence, and the plaintiff cannot recover."

We are of opinion that this instruction was erroneous in two material and important particulars. In the first part of the instruction the jury are told that if they believe the plaintiff's intestate had, for several days prior to the accident, passed the freight car in question in the day time, while it was standing in substantially the same position and while the deceased was riding as a conductor upon a car of the same size as that upon which he was riding at the time of the accident, *then the law presumes that the said intestate knew of the proximity of the said car to the track*, if the said car was in the said position at the time. Assuming the circumstances stated in the instruction to be established, the law would not presume from them that the plaintiff's intestate knew of the dangerous proximity of the freight car to his own. The fact that the decedent had passed this car before the accident, did not charge him with knowledge of its proximity to the track. Whether he knew of such proximity was a question of fact for the jury. He could not be held to know it is a matter of law. *Choctaw, &c. Co. v. McDade*, 191 U. S., 64-67, 48 L. Ed. 96, 24 Sup. Ct. 24; *Texas Pacific R. Co. v. Swearingen*, 196 U. S. 51, 49 L. Ed. 382, 25 Sup. Ct. 164.

In the cases cited, the structures which constituted the danger were permanent. The case at bar is stronger, in that the

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structure was temporary. To charge the servant with notice, the defect and danger must be unquestionably plain and clear, so that if he did not see it, he must necessarily have been in fault. *N. & W. Ry. Co. v. Cheatwood*, 103 Va. 356, 49 S. E. 489.

In the case at bar, the freight car was only standing at the company's freight house a small part of each day, and the deceased had only been passing there on the open car as a conductor a part of each of the preceding six days. It would have been very difficult for the deceased, under such circumstances, on a rapidly moving car, to have detected with the naked eye how near the freight car was to the track he was on, even if his attention had been directed to the subject. Certainly, the law, under such circumstances, does not presume that he knew that the freight car was in dangerous proximity. He had a right to assume that the defendant company had performed its duty, and that the tracks were a sufficient distance apart to avoid the accident which happened. Mere knowledge that a freight car was sometimes standing on the track at that point did not charge the deceased with knowledge of how close it was to the track he was on, or that its proximity was such as to make it dangerous for him to pass while in the discharge of his duty as conductor collecting fares.

The latter portion of the instruction is as follows: "And if the jury further believe that the said intestate could have performed his duties as conductor, and still have avoided being struck by the said car, then the said intestate was guilty of contributory negligence, and the plaintiff cannot recover."

Negligence consists of the failure, under the circumstances, to exercise ordinary care. There is no distinction between negligence in the plaintiff and negligence in the defendant, except that the negligence of the former is called contributory negligence. The latter part of this instruction required of the deceased a higher degree of care than the law imposes. It makes no allowance for the ordinary imperfections of humanity;



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it requires absolute perfection of attention to surroundings, while the mind is concentrated upon a particular duty. So high a degree of care the law does not enjoin. It requires only the exercise of reasonable and ordinary care—such care as reasonably prudent men would, under like circumstances, exercise for their safety. *Labatt on Master & Servant*, Vol. 1, sec. 328; *Bertha Zinc Co. v. Martin*, 93 Va. 791, 22 S. E. 869, 70 L. R. A. 999.

It is further contended, on behalf of the defendant in error, that even if the instruction mentioned be erroneous, the judgment should be affirmed, because no other verdict could have been rightly found.

The reference already made to the evidence in this case is sufficient to show that the rule invoked cannot be applied to a case like this, where a verdict for the plaintiff on the evidence adduced could not be properly disturbed.

As the judgment must be reversed for the errors pointed out, in the instruction, it is unnecessary to consider other assignments of error.

The judgment complained of must, therefore, be reversed, the verdict of the jury set aside, and the case remanded for a new trial not in conflict with this opinion.

*Reversed.*

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Syllabus.

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**Richmond.**

**SOUTHERN EXPRESS CO. v. KEELER.**

March 11, 1909.

Absent, Keith, P.

1. **EXPRESS COMPANIES—*Are Transportation Companies—Code (1904), Section 1294c (24).***—An express company is declared to be a transportation company by the statute law of this State and is, therefore, expressly included in the terms of section 1294c. (24) of Code (1904).
2. **CARRIERS—*Limiting Liability—Code (1904), Section 1294c (24).***—While at common law, a common carrier could not contract against his own negligence, he could qualify his liability as *quasi insurer* by special acceptance upon such reasonable terms and conditions as might be agreed upon with the shipper, provided they were not incompatible with his duty to the public. But it was the manifest purpose of the legislature, by the enactment of section 1294c (24) of the Code of 1904, to deprive the common carrier of the right to thus limit his liability, and to relegate him to his common law rights and responsibilities independent of contract.
3. **CARRIERS—*Fraudulent Concealment of Value By Owner—Case at bar.***—The facts of the case at bar do not warrant the contention of the express company that the shipper obtained a cheaper rate for her trunk by a fraudulent concealment of its true value. The agent of the company received the trunk from the shipper and removed it from an upper to a lower floor promising to return later and remove it, without making any inquiry as to its value or imparting any information as to rates. The company was afterwards three times requested over the 'phone to call for the trunk, but neglected to do so; and it was finally sent to the express office by a negro driver. When asked the value of the trunk, the driver truthfully answered that he did not know. The company issued and delivered to the driver a bill of lading which he delivered to the shipper, with the customary stamp, "value asked and not given."

**Held:** Fraudulent concealment cannot be predicated of such a state of facts.

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Statement.

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Error to a judgment of the Law and Equity Court of the city of Richmond in an action of trespass on the case. Judgment for the plaintiff. Defendant assigns error.

*Affirmed.*

Statement of agreed facts in an action of trespass on the case brought by Margaret Keeler against the Southern Express Company to recover damages for the loss of a trunk:

I.

On the 20th day of January, 1907, the plaintiff in this action was the owner of a certain trunk containing clothing, silverware, jewelry and other things enumerated below, which, together with the trunk, were of the value of four hundred dollars (\$400.00). On the said 20th day of January, 1907, the plaintiff in Petersburg, Virginia, summoned the defendant by telephone to transport the said trunk to Richmond, Virginia, but did not inform said company that the trunk was of unusual value. The Southern Express Company sent its agent to the residence whence the summons came, and the said agent removed the trunk from the upper floor to the lower floor of the house and there left it, saying that he would call later and take it away, but no information was asked or given said agent as to the value of the trunk and the contents. Although summoned three times to come for the trunk the Southern Express Company failed to send its agent back. Thereupon, on the 22nd day of January, the plaintiff intrusted the trunk to a colored driver to be carried to the office of the express company. The said colored driver, on said 22nd day of January, delivered said trunk, which was locked, to the agent of the Southern Express Company at Petersburg. The said agent inquired of the said driver the value of said trunk. The reply of the said driver was that he did not know. Whereupon the agent of the defendant company did receive the said trunk for transportation

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to Richmond, Virginia, and did issue to the said agent of the shipper the bill of lading, a copy of which is hereto attached by agreement of counsel, the original being lost by said plaintiff, which said bill of lading was accepted by the said driver, as agent of the plaintiff, and by said driver delivered to said plaintiff, with the words, value asked and not given, stamped on said bill of lading. At the time of the delivery of the said bill of lading to the agent of said shipper, he paid the agent of said defendant company, the sum of sixty-five cents, freight on said trunk, which weighed one hundred and fifty-five pounds.

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The contents of said truck were: underwear; one black broadcloth suit; one white broadcloth suit; one gray serge suit; one white crepe de chine dress; one black velvet hat (plumes); one white hat; one brown hat; two lace waists; one black silk waist; one dozen shirt waists; one black voile skirt; one black silk underskirt; one white silk underskirt; five pair of shoes; two blankets; five pillows; collection of sterling silver souvenir spoons, between six and seven dozen; manicure set; toilet articles—brush, silver, mirrors, etc.; one gold chain purse; two fancy combs; gold pins; gold buttons; belt buckles; three chains; and also one case containing the following sterling silver; one dozen dinner knives, one dozen dinner forks, one dozen dessert forks, one dozen dinner knives, one dozen fruit knives, one dozen tea spoons, one dozen table spoons, one dozen dessert spoons, one butter knife, one sugar shell, one cream dipper, one meat fork.

The rates of freight on packages shipped from Petersburg, Virginia, to Richmond, Virginia, then established and in force by the company were, for packages of less value than fifty dollars (\$50.00), the sum of forty cents (40c.) per cwt.; and on packages of greater value than fifty dollars (\$50.00), the same

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as the above, plus the further sum of five cents (5c.) for each one hundred dollars of the value or fraction thereof. The State Corporation Commission of the State of Virginia had not yet formally promulgated or established any rates, but upon complaints by shippers as to express rates the Southern Express Company had been summoned before the commission and their rates inquired into, and the commission had not changed the same. In March, 1907, the commission promulgated its rates which were the same as those formerly promulgated, fixed and charged by the express company, and these rates are now in force in the State of Virginia.

Hence if the true value of said trunk and its contents had been declared by the shipper or her agent, the value being four hundred dollars (\$400.00) and the weight 155 pounds, the charge would have been sixty-five cents (65c.) according to weight, plus twenty cents (20c.)

## III.

When the trunk above mentioned was delivered to the company as aforesaid, it was promptly handled and transported from Petersburg, Virginia, to Richmond, Virginia, in the manner and way in which packages of the known value of less than fifty dollars were and usually are handled, and was, on its arrival at the latter place, promptly taken to the warehouse and office of the Southern Express Company, as is customary with such packages.

## IV.

On the night of its arrival at the said warehouse, the said warehouse and office were destroyed by fire, together with a great portion of the contents thereof. The said fire was an accidental fire and was in no way caused by the negligence of the carrier nor of any of its servants or agents, and the said carrier, its agents and servants, used every reasonably possible exertion

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to save from destruction the contents of the said warehouse, and office.

From destruction by said fire were saved all packages delivered to the defendant express company for carriage on which a value of as much as fifty dollars had been declared by the consignors, and such packages of less value as was possible to save under the circumstances.

Before the expiration of thirty days from the time when said goods were lost, the plaintiff gave the defendant notice, in writing, of her claim for the loss of said goods and chattels.

## V.

The method of handling packages in use on the lines of the Southern Express Company varies directly as the value of such packages, it giving more care to packages of great value than to packages of a lesser value.

All packages shipped from Petersburg, Virginia, to Richmond, Virginia, of a declared value of as much as fifty dollars (\$50.00) are handled and transported in the following manner:

A package being offered to the company in Petersburg, at the company's office, it is weighed, and the shipper is asked the value. The rate of freight is then fixed as above mentioned, according to the published rates, and depends on the weight and on the value.

The rate being paid (or the package being sent C. O. D.), a receipt, contract or bill of lading, is issued showing the consignor, consignee, destination, origin and rate paid, the conditions and terms on which the shipment is accepted. The contract, receipt, or bill of lading in this case was in the usual form and contained the usual conditions.

The package is then taken charge of by the agent of the express company, and if a value of as much as fifty dollars (\$50.00) has been declared it is especially noted on an individual way

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bill showing the consignor; origin, destination, train handled on, consignee, value, rate paid, and the messenger by whom handled.

This messenger is personally responsible for the package, and is charged with the duty of taking extraordinary care thereof, and with placing it in the safest possible place, if the size permits, in a fire and burglar proof safe. In case of fire, accident or other unusual danger, he is charged with the duty of saving all valuable packages first, and then other packages if possible. In case a package has been declared of an extraordinary value, a special messenger is sent in charge of the individual package.

When the messenger in charge of a package of the value of fifty dollars (\$50.00) or more, arrives at the destination of such package, or at the end of his run, he surrenders the package only when he has been given a written individual receipt for the said package, said receipt being signed by the person receiving said package.

In cases of all packages on which a value of as much as fifty dollars (\$50.00) is declared, every agent and servant of the express company who handles the packages knows the value so declared, knows that there is a written proof that the said package is in his hands, and knows that he must not surrender the said package under any consideration unless he has received like written proof of him to whom he delivers it. In case of all packages of the declared value of fifty dollars (\$50.00), every possible precaution is taken for their safety. This necessitates a more costly method of handling by the company of those valuable packages than is used in the handling and transportation of packages of small value.

Packages of small value are handled in the following more economical manner:

A package is offered the company, at its office, at point of

## Statement.

shipment, and the package weighed and valued as above described.

The rate is then fixed as above with regard to weight and value. All packages on which a value of less than fifty dollars (\$50.00) has been declared are then noted on the general way bill, which show point of shipment, consignee and destination.

Such packages are not handled individually, in that they are checked only in the general run, that is, when arriving at destination or end of the messenger's run, they are called off by one messenger and checked by the other. Due care is used but not the unusual and extraordinary care that is expended on packages of greater value. No individual receipt for each package is taken, but a receipt for the general cargo is taken, and the way bills show what articles are included therein.

In case of fire or of attack or of any extraordinary danger the messenger's instructions and duty are to care first for the packages of greatest value, then for those of greater declared value than fifty dollars (\$50.00), and then for those of less value.

Every messenger or other servant or agent can look at his way bills and see exactly what packages are of a value of fifty dollars or more and exactly what the value of each of these has been declared to be. All messengers or other agents or servants of the defendant company know that packages on which no value has been declared are of less than fifty dollars of value, and that the freight rate paid on such packages has been secured on such low value.

Every messenger knows that it is his duty as above described to pay every attention, ordinary and extraordinary, to the safety of the valuable packages, and to use every reasonable care to insure the safety of the packages of low value.

Every messenger or other servant of the company is chargeable personally with all losses occurring while the package lost



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is in his custody and control, unless such loss can be properly explained as unavoidable.

*Copy of Bill of Lading.*

Read this contract.

SOUTHERN EXPRESS COMPANY.

Domestic Bill of Lading.

Not Negotiable.

Petersburg, Va., January 22, 1907.

Received of *Salnn M*

Value asked and not given.

One trunk. Valued at ..... dollars, and for which amount the charges are made by said company, marked

Miss Margaret Keeler,

214 E. Main St.,

(Copy.)

Richmond, Va.

Which it is mutually agreed is to be forwarded to our agency nearest or most convenient to destination only, and there delivered to other parties to complete the transportation.

It is part of the consideration of this contract, and it is agreed that the said express company are forwarders only, and are not to be held liable or responsible for any loss or damage to said property while being conveyed by the carriers to whom the same may be by said express company entrusted, or arising from the dangers of railroads, ocean or river navigation, steam, fire in stores, depots, or in transit, leakage, breakage, or from any cause whatever, unless in every case same be proved to have occurred from the fraud or gross negligence of said express company or their servants, unless specially insured by it and so specified on this receipt, which insurance shall constitute the limit of the liability of the Southern Express Company in any

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event; and if the value of the property above described is not stated by the shipper at the time of shipment and specified in this receipt the holder hereof will not demand of the Southern Express Company a sum exceeding fifty dollars for loss of or damage to the shipment herein receipted for. Nor shall the said company be held responsible for the safety of said property after its arrival at its place of destination.

And if the same is intrusted or delivered to any other express company or agent (which said Southern Express Company are hereby authorized to do) such company or person so selected shall be regarded exclusively as the agent of the shipper or owner, and as such alone liable, and the Southern Express Company shall not be in any event responsible for the negligence or non-performance of any such company or person; and the shipper and owner hereby severally agree that all the stipulations and conditions in this receipt contained shall extend to and inure to the benefit of each and every company or person to whom the Southern Express Company may intrust or deliver the above described property for transportation, and shall define and limit the liability therefor of such other company or person. In no event shall the Southern Express Company be liable for any loss or damage, unless the claim therefor shall be presented to them in writing at this office, within thirty days after this date, in a statement, to which this receipt shall be annexed. All articles of glass, or contained in glass, or any of a fragile nature, will be taken at shipper's risk only, and the shipper agrees that the company shall not be held responsible for any injury by breakage or otherwise, nor for damage to goods not properly packed and secured for transportation. It is further agreed that said company shall not, in any event, be liable for any loss, damage, or detention caused by the acts of God, civil or military authority, or by insurrection or riot, or the dangers incident to a time of war.

If any sum of money, besides the charges for transportation, is to be collected from the consignee on delivery of the above

## Opinion.

described property, and the same is not paid within thirty days from the date thereof, the shipper agrees that this company may return said property to him at the expiration of that time, subject to the conditions of this receipt, and that he will pay the charges for transportation both ways, and that the liability of this company for such property while in its possession for the purpose of making such collection, shall be that of warehouseman only.

For the company,

TAYLOR"

In this case, neither party demanded a jury, and the whole matter of law and fact having been submitted to the court, judgment was rendered for the plaintiff for the sum of \$400, the value of the trunk. To which judgment the Express Company brings error.

*James H. Drake, Jr., and Wyndham R. Meredith*, for the plaintiff in error.

*Garnett & Pollard*, for the defendant in error.

WHITTLE, J. (after stating the foregoing facts), delivered the opinion of the court.

In its main features, this case is ruled by the decision in *Chesapeake & Ohio Railway Company v. Pew*, ante, p. 288, 64 S. E. 35, in which an opinion was handed down at the present term. Both cases arose under the concluding sentence of the first paragraph of section 1294c (24), Va. Code, 1904, which provides, that "no contract, receipt, rule, or regulation shall exempt any such common carrier, railroad or transportation company from the liability of a common carrier which would exist had no contract been made or entered into."

An express company is declared to be a "transportation company," by our statute, and is, therefore, expressly included in the foregoing enactment. Section 1294a (2).

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The fundamental error in the contention in favor of the limited liability of the express company in the present instance consists in assuming that the rights of the parties are as at common law, ignoring the provisions of section 1294c (24). It is well settled that, while at common law a common carrier could not contract against his own negligence, he could qualify his liability as *quasi insurer* by special acceptance upon such reasonable terms and conditions as might be agreed upon with the shipper, provided they were not incompatible with his duty to the public. But it was the manifest purpose of the legislature, by the language quoted, to deprive the common carrier of the right to thus limit his liability and to relegate him to his common law rights and responsibilities, independent of contract.

It need only be observed, in conclusion, that the agreed facts do not sustained the remaining contention, that the plaintiff obtained a cheaper rate for the transportation of her trunk by fraudulent concealment of its true value.

The agent of the express company received the trunk from the owner, removing it from the upper to the lower floor of the house in Petersburg at which she was staying, and went away, promising to return for the trunk later, but without making any inquiry as to its value, or imparting any information on the subject of rates. The company was afterwards three times requested by 'phone to call for the trunk, but neglected to do so; and it was finally sent to the express office by a negro driver. When asked the value of the trunk, the driver truthfully answered that he did not know.

Fraud cannot be predicated of such a state of facts, and the mere acquiescent acceptance by the shipper of a bill of lading prepared by the express company with the customary stamp, "value asked and not given."

We are of opinion that the judgment of the Law and Equity Court of the city of Richmond is without error, and must be affirmed.

*Affirmed.*

## Statement.

## Richmond.

## WOOD'S EXECUTORS AND OTHERS v. WOOD AND OTHERS.

March 11, 1909.

1. WILLS—*Testamentary Capacity*.—A testator who is a clear headed business man, with ability to attend accurately and successfully to the affairs of life is not deficient in capacity to make a will, though he is seventy years of age and unable to read or write.
2. WILLS—*Undue Influence—Duress—Burden of Proof—Case in Judgment*.—Before undue influence can be made the ground for setting aside a deed or will, it must be sufficient to destroy free agency on the part of the grantor or testator. It must amount to coercion, practical duress. It must be shown to the satisfaction of the court that the party had no free will, but stood *in vinculis*; and the burden of proof in such a case, as in a case where fraud is charged, is always on him who charges undue influence. In the case in judgment, there is no evidence of any specific act of undue influence exerted or attempted to be exerted over the testator by any one charged with being in a position to guide his judgment, but the acts proved are entirely consistent with innocence and purity on the part of all who are connected with them.
3. WILLS—*Verdicts—Jury's View of What Testator Should Have Done*.—A jury is not justified, and will not be sustained, in setting aside the expressed intention of a testator because, in its judgment, a more equitable disposition of his property could have been made.

Error to a judgment of the Circuit Court of Norfolk county approving the verdict of the jury on an issue *devisavit vel non*. Judgment for the defendants in the issue. Plaintiffs assign error.

*Reversed.*

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The opinion states the case.

*Thos. H. Willcox, Charles Whidbee and E. R. Baird, Jr.,*  
for the plaintiffs in error.

*R. Randolph Hicks,* for the defendants in error.

HARRISON, J., delivered the opinion of the court.

The purpose of this suit is to contest the will of Zadoc W. Wood, deceased.

The testator by his will makes an unequal distribution of his estate among his descendants, and the suit to set aside the will is brought by those who were given the smaller portions against those who were more liberally provided for. The bill alleges a lack of testamentary capacity on the part of the testator, and charges that undue influence was exerted over him by James E. Wood, S. W. Wood and Sarah F. Quillin, three of his children, who were among the more fortunate beneficiaries.

These defendants answered the bill, denying all of its allegations. A jury was impaneled to try the issue of *devisavit vel non*, and brought in a verdict for the contestants.

Numerous exceptions were taken to the rulings of the court in admitting evidence and giving instructions, but in the view we take of the case it is only necessary to consider the action of the court in refusing to set aside the verdict as contrary to the law and the evidence.

The testator with his wife went, in January, 1902, to live in the home of his daughter, Sarah Quillin. On the 13th of the following April his wife, to whom he had given his property by a previous will, died. In less than two weeks after his wife's death the testator executed the will in controversy, in the office of a lawyer who had prepared the document at his

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request, and in accordance with a memorandum furnished him by the testator. After the will was executed, it was left by the testator in the hands of the lawyer who had prepared it, where it remained until after the testator's death, when it was delivered to James E. Wood and S. W. Wood, two of his sons, who were the executors named therein; and on their motion it was admitted to probate in the Circuit Court of Norfolk county.

Two questions were involved in the issue: (1) The testamentary capacity of Zadoc W. Wood; and (2) the undue influence charged to have been exerted over the testator.

With respect to the testamentary capacity of the testator at the time the will in question was executed, it is only necessary to say that it appears to have been abundantly established. The testator was seventy years of age and could not read or write, but it is shown that he was a man of unusual mental and physical capacity, a clear-headed business man, with an ability to attend accurately and successfully to the affairs of life that was exceptional. The evidence is overwhelming to this effect, and none is introduced which shows that at the time of the execution of his will the testator was at all lacking in testamentary capacity.

This brings us to the question of undue influence.

Before undue influence can be made the ground for setting aside a deed or will, it must be sufficient to destroy free agency on the part of the grantor or the testator; it must amount to coercion—practically duress. It must be shown to the satisfaction of the court that the party had no free will, but stood *in vinculis*; and the burden of proof in such a case, as in a case where fraud is charged, is always on him who charges undue influence. *Jenkins v. Rhodes*, 106 Va. 564, 56 S. E. 332; *Wallen v. Wallen*, 107 Va. 131, 57 S. E. 596, 1 Va. App. 351; *Hoover v. Neff*, 107 Va. 441, 59 S. E. 428, 1 Va. App. 622.

The record fails to furnish any evidence showing any specific act of undue influence exerted or attempted to be exerted over

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this testator by anyone charged with being in a position to guide his judgment. There is nothing tending to show that anything was said or done, directly or indirectly, to control his wishes. The contestants rest their charge of undue influence altogether upon such circumstances as the following: That at the time of the execution of his will the testator was living in the house of his daughter, Sarah Quillin; that James E. Wood was authorized by his father to bring a lawyer to write his will, and that he brought his own lawyer and did not bring the lawyer who was then representing his father in a case, and who had represented him on former occasions; that the memorandum for the will was given to the lawyer at the residence of Sarah Quillin, and that James E. Wood was in the room a part of the time when the memorandum was being made; that James E. Wood and S. W. Wood were present in the lawyer's office a part of the time when the will was being read and executed; that James E. and S. W. Wood were named as executors and authorized to qualify as such without security; that the will was left in the office of the lawyer who wrote it, and remained with him until after the testator's death, a period of four years; that the will was read only once in an ordinary tone of voice, though the testator was deaf. (It should be observed in connection with this circumstance, that when the will was read the testator called attention to the omission of a provision for his burial expenses, and had it inserted.)

There may possibly be others, but the foregoing are sufficient to show the character of circumstances relied on. These circumstances, if true, fail to furnish the slightest evidence of undue influence over the testator in the making and execution of his will. They are entirely consistent with innocence and purity of purpose on the part of all who were connected with them, and furnish no sufficient ground for setting aside this will.

It appears that the testator gave equal shares of his property to his three sons, James E., Samuel W., and Isaac Wood, and



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to his daughter, Sarah F. Quillin; that he gave a lesser share to his daughter, Mrs. Seely; and gave to his grandchildren, the descendants of two deceased sons, each a small legacy. It is apparent from the whole record that this unequal disposition by the testator of his property is the sole ground for the contention that the testator was unduly influenced, and the only basis for the verdict in this case. A jury, however, is not justified, and will not be sustained, in setting aside the expressed intention of a testator because, in its judgment, a more equitable disposition of his property could have been made.

We are of opinion that no proper verdict can be rendered for the contestants upon the evidence disclosed by the record before us.

The judgment complained of must be reversed, the verdict of the jury set aside, and the cause remanded for further proceedings not in conflict with the views expressed in this opinion.

*Reversed.*

## Syllabus.

**Richmond.**

## WILLIS AND OTHERS v. KALMBACH AND OTHERS.

March 18, 1909.

1. **CONSTITUTIONAL LAW—*Legislative Powers of General Assembly.***—As to matters not ceded to the Federal Government, the legislative powers of the General Assembly are without limit, except so far as restrictions are imposed by the Constitution of the State in express terms or by strong implication. The State Constitution is a restraining instrument only, and every presumption is made in favor of a State statute.
2. **CONSTITUTIONAL LAW—*Statutes—Validity—Construction.***—While the courts have the power, and in a proper case it is their duty, to declare a statute unconstitutional, it is a duty of the utmost delicacy. Every presumption is to be made in favor of the constitutionality of a statute, and it can never be declared unconstitutional except where it is *clearly* and plainly so. To doubt is to affirm constitutionality. There is no such thing as a doubtful constitutional statute.
3. **INTERPRETATION OF WRITINGS—*Words—Harmonizing Whole.***—In the interpretation of all writings words must be construed with reference to their plain and ordinary meaning, and, if possible, every word must be given its due force and effect, but at the same time each part of the writing must be construed with reference to every other part, so as to make it harmonious and sensible as a whole, if possible.
4. **CONSTITUTIONAL LAW—*Office of Schedule.***—The office of a schedule to a Constitution, as a general rule, is to provide for a transition from the old to the new government, and to obviate inconveniences which would otherwise arise from such transition, and not to introduce independent and substantive provisions of law into the Constitution, though the latter may be done if the purpose to do so plainly appears.
5. **CONSTITUTIONAL LAW—*Elections—Qualification of Electors—Special Elections—Ward Act.***—In view of the foregoing rules of interpretation, the policy of the State from the foundation of the

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government until now of permitting the legislature to fix the electorate for all special elections except for officers elective by the people, and the construction placed upon similar provisions of the Constitutions of other States of the Union, the language of section eighteen of the schedule to the Constitution of 1902, "in all elections held after this Constitution goes into effect, the qualifications of electors shall be those required by article II of this Constitution," is applicable only to elections provided for by the Constitution and schedule, and not to other elections which the legislature may see fit to order. As to the latter, the legislature has the power to fix the electorate. Hence the act approved February 25, 1908 (Acts 1908, p. 83), commonly known as the Ward Act, prescribing the qualification of voters in special and local option elections, in so far as it affects elections not provided for by the Constitution and schedule is a valid exercise of legislative power.

6. CONSTITUTIONAL LAW—*Statutes—Operation—Subsequent Approval Local Option Laws.*—When not restrained by the Constitution, in express terms or by necessary implication, the legislature has the power to make the operation of a statute dependent upon a vote of the people thereafter to be taken. In this State there is no constitutional inhibition on the power of the legislature to pass local option laws.

Error to a judgment of the Corporation Court of the city of Fredericksburg in a contested election case. To a judgment setting aside the election, the contestees assign error.

*Reversed.*

The opinion states the case.

*Wm. H. Mann, R. E. Byrd, F. M. Chichester and B. P. Willis*, for the plaintiffs in error.

*St. George R. Fitzhugh, Alvin T. Embrey and C. O'Connor Goolrick*, for the defendants in error.

KEITH, P., delivered the opinion of the court.

Upon the petition of the requisite number of persons, an election was ordered by the Corporation Court of the city of

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Fredericksburg, to take place on the 5th day of May, 1908, upon the question "for licensing" or "against licensing" the sale of intoxicating liquors within the limits of the said city. At the election held in obedience to this order, 351 ballots were cast against and 320 in favor of licensing.

On May 14, 1908, a petition, signed by 24 persons was filed, praying that the election be declared illegal, null and void, upon the following grounds:

"(1) Because the persons petitioning for the election had not paid their poll taxes as required by law six months prior to the presentation of the said petition to the Corporation Court of Fredericksburg, and none of them were exempt from the payment of capitation taxes as a prerequisite to voting, and hence none of them were qualified voters authorized to sign said petition.

"(2) Because about 80 *per cent.* of the persons voting at the election were not qualified voters, none of them having paid their poll tax six months prior to the date of the election, they not being exempt from such payment.

"(3) Because the act of the General Assembly approved February 25, 1908, known as the Ward Act (Acts 1908, p. 83), is unconstitutional and void, inasmuch as the said act provides that at any local option election held on or before the second Tuesday in June any person shall be qualified to vote who is otherwise qualified to vote and has personally paid, at least six months prior to the second Tuesday in June of that year, all State poll taxes assessed or assessable against him during the three years next preceding that in which such special or local option election is held."

A number of citizens who had voted against license were made parties defendant, and filed their answer, denying all the material allegations of the petition; and the case coming on to be heard upon the petition, the answer and the testimony of witnesses, an order was entered holding the Ward Act passed February 25, 1908, to be in plain conflict with the Constitution

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of Virginia, and that the election held on May 5, 1908, was null and void.

To that judgment a writ of error was allowed by this court.

The only question insisted upon in the argument before us, and the only one which we shall consider, is as to the constitutionality of the act of assembly approved February 25, 1908, and commonly known as the Ward Act (Acts 1908, p. 83).

Counsel for plaintiffs in error have warned us of the evils which must flow from an affirmance of the judgment of which they complain, while counsel for defendants in error forebode consequences no less mischievous should the judgment be reversed. In this dilemma, we cannot do better than to concede that the case is one of grave importance, and that any conclusion we may reach will be attended by serious results to the interests involved.

To pass upon the power of the legislature and determine whether a statute which it has enacted is a valid exercise of its power, or is to be deemed null and void on account of its repugnancy to the Constitution, is a duty of the utmost delicacy. From the earliest exercise of this power by the courts, down to the latest expression upon the subject, they have with one voice declared, that while the power was essential in a government in which the people, who are the source of all power, have seen fit to restrain the various governmental agencies, which they have established, by an organic act or Constitution emanating directly from themselves, nothing short of a plain and palpable repugnaney to the Constitution of the statute whose validity is called in question can warrant a court in holding a statute to be null and void.

Another principle of equal authority is that "as to matters not ceded to the Federal government, the legislative powers of the General Assembly are without limit, except so far as restrictions are imposed by the Constitution of the State in express terms, or by strong implication. The State Constitution is a restraining instrument only, and every presumption is made

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in favor of the constitutionality of a State statute. No stronger presumption is known to the law. In order to warrant the courts to declare a State statute unconstitutional, the infraction must be clear and palpable." *Whitlock v. Hawkins*, 105 Va. 242, 53 S. E. 401.

As is said in *Prison Association of Virginia v. Ashby*, 93 Va. 667, 25 S. E. 893, "the legislature of the State has plenary legislative power, except where it is restricted by the Constitution of the State, or of the United States, and the courts have no power to declare its acts invalid merely because they regard the legislation as unwise or vicious."

And in *Button v. State Corporation Commission*, 105 Va. 634, 54 S. E. 769, it is said that acts of the legislature "are always presumed to be constitutional, and can never be declared otherwise, except where they clearly and plainly violate the Constitution. All doubts are resolved in favor of their validity, and, in resolving doubts, the legislative construction put upon the Constitution is entitled to great consideration, though it will not be given a controlling effect." See also *Eyre v. Jacob*, 14 Gratt. 422, 73 Am. Dec. 367.

The principles enunciated in these decisions are fully recognized and firmly established.

By article II, section 18 of the Constitution, it is provided, that "every male citizen of the United States, twenty-one years of age, who has been a resident of the State two years, of the county, city, or town one year, and of the precinct in which he offers to vote, thirty days, next preceding the election in which he offers to vote, has been registered, and has paid his State poll taxes, as hereinafter required, shall be entitled to vote for members of the General Assembly and all officers elective by the people; \* \* \*."

The remaining sections of that article merely serve to provide the means by which the voter may be secured in the exercise of his right, and the public may be protected against fraudulent and illegal voting.

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This article prescribes the qualifications for voters for members of the General Assembly and all officers elective by the people; that and none other is its purpose and extent.

It will be well to consider the suffrage provisions of former Constitutions of this Commonwealth.

In the Constitution of 1776, it was provided, that "the right of suffrage in the election of members to both houses shall remain as exercised at present;" and turning to Henning's Statutes at Large, Vol. 8, at p. 306, we find, that "every person shall have a right to vote at any election of burgesses, for any county, who hath an estate of freehold for his own life or the life of another or other greater estate" in land as therein prescribed; thus incorporating into the Constitution the right of suffrage as it was at that time exercised by virtue of the statute law.

By the Constitution of 1830, "every white male citizen resident therein, aged 21 years and upwards being qualified to exercise the right of suffrage according to the former Constitution and laws, and every such citizen being possessed or whose tenant for years or at will or at sufferance, is possessed of an estate of freehold of the value of \$25 \* \* \* shall be qualified to vote for members of the General Assembly."

Under the Constitution of 1850, "every white male citizen of the Commonwealth who has been a resident of the State for two years, and of the county, city or town where he offers to vote for twelve months next preceding an election—and no other person—shall be qualified to vote for members of the General Assembly and of all officers elective by the people."

A similar provision occurs in the Alexandria Constitution of 1864; and by that of 1869, known as the Underwood Constitution, "every male citizen of the United States who shall have been a resident of this State twelve months and of the county, city or town in which he shall offer to vote three months next preceding the election shall be entitled to vote upon all questions submitted to the people at such election."

It is to be observed that down to 1850, the qualification of

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voters applied only to the election of members of the General Assembly. At that time, however, the number of officers to be chosen by direct vote of the people was greatly increased, and provision was then made, that the electorate created by the Constitution should be qualified to vote for members of the General Assembly and for *all officers elective by the people*. It is a striking circumstance that the Constitution of 1869, provided that the electorate which it created should be "entitled to vote upon *all questions submitted to the people at such election,*" and that within seven years after its adoption that Constitution was amended and the language of the Constitution of 1850 upon this subject was restored.

We think it plain that if the question before us were to be determined by reference to the second article of the Constitution, there could be no doubt that the legislature, following the precedents that had been established from the foundation of our government, would have had the right to prescribe the qualifications of voters at all elections except those for members of the General Assembly and officers elective by the people, the only elections which are mentioned or referred to in that article, or indeed in any part of the Constitution until we come to the schedule, the effect of which we shall now consider.

The 15th section of the schedule provides, that "in all elections held after this Constitution goes into effect, the qualifications of electors shall be those required by article two of this Constitution;" and the contention is that the phrase "all elections" embraces not only all elections provided for by the Constitution, but elections of every kind and description—that it fastens itself upon, regulates, and controls the power of the legislature with respect to all elections which it may see fit to order, and confines the electorate to those having the qualifications required by article II of the Constitution.

It is true that in the interpretation of all writings words must be construed with reference to their plain and ordinary meaning, and, if possible, every word must be given its due



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force and effect; but, in the effort to give the words their due force, we must not lose sight of other parts of the instrument, but each part must be construed with reference to the whole, so as to make it harmonious and sensible as a whole.

As was said by Judge Moncure in *The Richmond Mayoralty Case*, 19 Gratt. at p. 712, "the office of a schedule is to provide for a transition from the old to the new government, and to obviate inconveniences which would otherwise arise from such transition." Elsewhere in the same opinion it is said, that "if a convention, in framing the schedule, should plainly show an intention to place any of its provisions beyond the control of the legislature, such provisions, being the act of the representatives of the sovereignty of the State without any constitutional restrictions, would be as effectual and binding as if they were embodied in the Constitution itself."

The general principle, however, is that the office of a schedule, as this schedule discloses, is not to cure defects or provide for omissions in the Constitution; not to introduce new and substantive provisions into the Constitution—there was no occasion for that. The whole subject, the entire instrument, was within the breast of the convention and subject in all its parts to be altered and amended as to the convention seemed best. Is it to be supposed that under such circumstances a provision which was to limit the power of the legislature over a numerous and important class of subjects, a power which had existed in and been exercised by all preceding legislatures, would have been postponed to the schedule? To do so would be to suggest doubt and to invite controversy, when, if such was the purpose of the convention, it could have been placed beyond the pale of question or debate by its insertion where it properly belonged.

But it is urged upon us that the convention was called and the Constitution was adopted in order to purge the electorate of ignorant and undesirable voters, and that unless all elections of whatever description are to be confided to the electorate thus established, the convention to that extent fell short of discharging its duty.

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We have seen that in the several Constitutions of this State, down to that of 1869, and under it after the amendment of 1876, the General Assembly, without question in numerous instances and in furtherance of various objects, exercised its power and discretion in submitting questions to an electorate of its own choosing, with qualifications different from those prescribed by the Constitution. We have seen that the Constitution of 1869 provided in express terms that the electorate which it established should vote "upon all questions submitted to the people;" and we have seen that this provision was stricken out, and the phrase "for members of the General Assembly and all officers elective by the people," was inserted, thereby bringing the Constitution of 1869 into harmony with the long established policy of the Commonwealth.

This circumstance seems to us to be one of the utmost importance. From 1776 to 1869 the power had been exercised by the General Assembly, when dealing with elections not provided for in the Constitution, to prescribe the qualifications for an electorate as to such elections. By the Constitution of 1869 this power was taken away, and the people of Virginia, with their attention directed to the specific question, voted to strike this provision from the Constitution and restored the power to the General Assembly.

It is true that the convention of 1901 was assembled in order to purge the electorate of ignorant and undesirable voters. When the convention met the chief difficulty encountered in the performance of their duty was found in the limitations upon their power contained in the Fourteenth and Fifteenth Amendments to the Constitution of the United States.

The object of the Fourteenth Amendment, so far as it bears upon the question before us, was to secure "the right to vote at any election for the choice of electors for president and vice-president of the United States, representatives in congress, the executive and judicial officers of a State, or the members of the legislature thereof."

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The Fifteenth Amendment declares that "the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."

We think that it may fairly be said that the Fifteenth Amendment is intended to secure the right of citizens to vote in the elections enumerated in the Fourteenth Amendment; that with respect to the right of suffrage the two amendments cover and embrace the same objects.

These amendments imposed the only limitations that existed upon the power of the convention to deal with the question of suffrage, and certainly the Fourteenth Amendment never contemplated an election such as we are now considering.

So far as the history of the times throws light upon the situation, there is nothing to suggest that any part of the evil with which the convention had to deal grew out of, or was in any degree referable to the improper exercise of the power which the legislature had theretofore possessed, to provide an electorate other than that created by the Constitution for the determination of elections for which the Constitution itself did not provide.

The exercise of the power having been the subject of no complaint, it may well be supposed that the convention felt that having purged the electorate by which the General Assembly was to be chosen, that body would be in the future entitled to the same confidence and respect which it had theretofore enjoyed.

It is said, however, that unless the construction contended for by defendants in error be given to the 18th section of the schedule, it would be meaningless and inoperative.

The schedule provided for convening the legislature within five days after the Constitution went into effect. The eighteenth section of the schedule provides, that in all elections held after the Constitution goes into effect the qualification of electors shall be those required by article II of the Constitution—that is,

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with respect to all elections which were intended to be embraced by this section of the schedule all the requirements of article II should apply; not this or that section of article II, but article II as an entirety. Some of the sections of that article are not self-executing and require legislative action to render them operative. The schedule refers in terms to many, if not all, the elections, State, county and municipal provided for by the Constitution, and it is a reasonable construction of the 18th section of the schedule to make it apply either to all elections ordained by the Constitution, or to all such as are mentioned in the schedule itself, if any election provided for by the Constitution be omitted; or, to put it more accurately, is such a construction so manifestly contrary to, unwarranted by and so plainly at war with the Constitution that it must be condemned by the courts?

The word "all" is without doubt one of very comprehensive meaning, but the meaning to be given to it in any particular case must be determined by its context. It may have its broadest signification, or it may be limited in its meaning to all of a particular kind or class. This phrase "all elections" has been frequently construed by the courts of other States.

In *Birchmore v. State Board of Canvassers*, 76 S. C. 461, 59 S. E. 145, the Supreme Court of South Carolina held, that an election to determine whether or not intoxicating liquor may be sold in a precinct is within a constitutional provision that all elections shall be by ballot. This case is reported in 14 Lawyers' Reports Annotated (N. S.), on page 850, and is the subject of an elaborate note, in which it is said that the position of the court, that the phrase "all elections," as used in the Constitution, was sufficiently broad to include not only elections for the selection of officers, but also elections to determine any particular or special question which might be submitted to the electors, "seems to be contrary to the weight of authority, as the general rule appears to be that the words 'election' or 'all elections' imply merely elections for the selec-

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tion of officers, and that elections for the decision of some stated proposition need not be conducted under the formal and prescribed rules for elections for the selection of officers." In support of this criticism many cases are cited.

In *Valverde v. Shattuck*, 19 Col. 104, 34 Pac. 947, 47 Am. St. Rep. 208, the Constitution in question provided, that "Every male person over the age of twenty-one years, possessing the following qualifications, shall be entitled to vote at all elections." The court said: "In our opinion the word 'elections' thus used does not have its general or comprehensive signification, including all acts of voting, choice, or selection without limitation, but is used in a more restricted political sense—as elections of public officers."

In *Graham v. Greenville*, 67 Tex. 62, 2 S. W. 742, article 503 of the revised statutes reads as follows: "Whenever a majority of the inhabitants qualified to vote for members of the State legislature of any territory adjoining the limits of any city accepting the provisions of this title, to the extent of one-half mile in width, shall vote in favor of becoming a part of said city, any three of them may make affidavit to the fact, to be filed before the mayor, who shall certify the same to the city council of said city." Under this law the court held that a petition signed by a majority of the qualified voters within a certain district was a sufficient vote to determine the question of annexation, although the Constitution said that in all elections by the people the vote should be by ballot; the court holding that this provision of the Constitution did not provide that the will of a limited number of people on any subject in which they might be interested should be ascertained in no other way than by ballot.

In *Porter v. Crock*, 126 Ala. 600, 28 South. 745, the Constitution provided that all elections by the people should be by ballot, and that the General Assembly should pass laws to regulate and govern elections in the State, and all such laws should be uniform throughout the State; and that no classes

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of qualified voters should be excluded from participating in the elections. The legislature passed a law providing for an election to establish a county seat, which law required ballots to be numbered, and that the election be restricted to voters within the county. The court said that it might well be doubted whether the provisions of the article of the Constitution cited above did not relate exclusively to elections held to select public officers; but that it was unnecessary to decide that question, as the power to locate or change a county seat was exclusively in the legislature, and it could prescribe any method for selecting a location that it chose.

In *Pritchard v. Magoun*, 109 Iowa, 364, 80 N. W. 512, 46 L. R. A. 381, a statute contained the following provisions: "That in all elections to be held after November 1, 1892, in the State, for public officers (except those elected at school elections), the voting shall be by ballots, printed and distributed at public expense as hereinafter provided; and no other ballot shall be used." "The term 'city election' shall apply to any municipal election held in a city or incorporated town." The court held that the latter provision was not intended to apply to a special election, although held within the limits of a city, and the provisions, taken together, did not require that an election to decide the question of raising money to build a bridge should be by ballot.

And the same laws were held not to apply to a special election held for the purpose of raising money to support a railroad. *Bras. v. McConnell*, 114 Iowa, 402, 87 N. W. 290.

See also, *Buckner v. Gordon*, 81 Ky. 665; *Belles v. Burr*, 76 Mich. 1, 43 N. W. 24.

In *Hanna v. Young*, 84 Md. 179, 35 Atl. 674, 57 Am. St. Rep. 396, 34 L. R. A. 55, the Supreme Court of Maryland construed a provision of the Constitution of that State which reads as follows: "All elections shall be by ballot and every male citizen of the United States of the age of twenty-one years or upwards, who has been a resident of the State for one year,

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and of the legislative district of Baltimore city, or of the county, which he may offer to vote, for six months next preceding the election, shall be entitled to vote, in the ward or election district in which he resides, at all elections hereafter to be held in the State." "It is contended," said the court, "that this section of the Constitution plainly comprehends and includes within its express terms all elections, whether State, Federal, county, or municipal. Yet there is but one municipality mentioned in this section of the organic law, and, in fact, Baltimore city is the only municipality mentioned *eo nomine* in any part of the Constitution. This court in *Smith v. Stephan*, 66 Md. 381, 7 Atl. 561, 10 Atl. 671, Mr. Justice Bryan, delivering the opinion of the court, said: 'It is sufficient to say that no municipal elections except those held in the city of Baltimore are within the terms or meaning of the Constitution.' Whilst the Constitution, article III, section 48, authorizes and empowers the General Assembly to create corporations for municipal purposes, it nowhere prohibits the legislature from imposing upon the qualified voters, residing within the corporate limits of a town, any reasonable restrictions it may deem proper, when seeking the exercise of the right of elective franchise in the selection of its officers. In this respect the power of the legislature is unlimited."

The contention before the Maryland court was, as here, that the act in question was void because the Constitution had conferred the right and prescribed the qualifications of electors at all elections, and the legislature was, therefore, without authority to change or add to them in any manner. Speaking to this proposition, the court said: "The Constitution of this State provides for the creation of certain offices, State and county, which are filled, either by election or by appointment; and we regard it as an unreasonable inference to suppose that municipal elections, held within the State (outside the corporate limits of Baltimore city), can be properly termed elections under the Constitution, such as State and county elections; or

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that the framers of the Constitution ever contemplated that article I, section 1, of that instrument was intended to apply to municipal elections, such as the one now under consideration, which is the mere creature of statutory enactment." The court then refers with approval to the case of *Attorney General v. Dillon*, 32 Fla. 545, 14 South. 383, 22 L. R. A. 124, where it was held that the suffrage provision in the Constitution of that State, prescribing the qualifications of voters at all elections under it, does not apply to elections for municipal officers, but such elections are subject to statutory regulation; and, further, that it is competent for the legislature to prescribe the qualifications of voters at the same. Continuing, the Maryland court says: "It is only at elections which the Constitution itself requires to be held, or which the legislature under the mandate of the Constitution makes provision for, that persons having the qualifications set forth in said section 1, article I, are by the Constitution of the State to be qualified electors." See also *McMahon v. Savannah*, 66 Ga. 217, 42 Am. Rep. 65.

We have freely used the notes to cases in *Lawyers' Reports Annotated*, and cheerfully acknowledge our obligation.

To recapitulate the case made by the record: We find that the power which the order appealed from denies to the General Assembly has been exercised by that body under every Constitution of this Commonwealth from 1776 down to that of 1902. Down to the Constitution of 1850, the right to vote was expressly given by the Constitutions only as to members of the General Assembly. By the Constitution of 1850 the right was extended by adding the phrase "all officers elective by the people." The Constitution of 1864 used the same expression. In 1869 the constitutional provision was extended to "all questions submitted to the people," which was by direct vote of the people stricken out in 1876, and the right "to vote for members of the General Assembly and all officers elective by the people" was substituted for it. As we have seen, the principal object of calling the convention of 1901 was to purge



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the electorate of undesirable and ignorant voters, and the chief difficulty in accomplishing that object was found in the fourteenth and fifteenth amendments to the Constitution of the United States. The provision of the second article of the State Constitution confers a right of suffrage which is practically commensurate with these amendments. The Constitution of the State, exclusive of the schedule, it is conceded, does not make the act of assembly here called in question unconstitutional; but, if it be so, it is by virtue of the 18th section of the schedule. The office of a schedule is to "provide for the transition from the old to the new government," and not to introduce independent and substantive provisions of law into the Constitution, though it is conceded that it may be done if such purpose plainly appears. When the schedule was prepared, the whole of the Constitution was still within the control of the convention to alter and amend as it deemed proper, and, had such been the purpose, a provision so important as that under consideration would have been inserted in its appropriate place in plain and unequivocal language, as was done in the Constitution of 1869, and not in an unusual and inappropriate place and expressed in undecided and ambiguous terms, certain to cause doubt and to invite controversy. The phrase "all elections," as must have been known to the learned lawyers in the convention, had in many States been held to refer only to such elections as had been prescribed by the Constitution itself, and, indeed, at the time the schedule was adopted, there was no decision to the contrary, the case of *Birchmore v. State Board of Canvassers*, *supra*, having been decided since that date.

We have seen that article II was not self-executing as to some of its features, and that the schedule provided for the assembling of the legislature within five days after the Constitution went into effect. Many if not all of the elections mentioned in the Constitution are referred to in the schedule, and it was a natural and proper thing, under all the circumstances, to insert a mandatory clause in the schedule which made it imperative upon

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the General Assembly to provide at once that "all elections" within the purview of the Constitution and schedule should be held in accordance with article II.

When all these facts are recalled, and the rules of construction to which we have referred are applied to them, when we reflect that all legislative power may be exercised by the General Assembly, except as restrained by the Constitution; that it is only in cases of plain and palpable repugnancy to the Constitution that we can declare the statute to be unconstitutional; and that to doubt is to affirm the validity of the statute; we are led to the conclusion that the statute in question is a valid expression of legislative power.

*Bull and Others v. Read*, 13 Gratt. 78, is a leading case in this State and beyond its limits with respect to the power of the legislature to make the operation of a statute dependent upon a vote of the people thereafter to be taken, or other future contingency, and in the course of his opinion, Judge Lee speaks as follows: "As to the wisdom and expediency of this kind of legislation, this is not the place to express an opinion. To say that it is liable to be abused is but to affirm what is equally true of every mode of legislation. Whilst there may be occasions on which it may be adopted with advantage to the public interest, it may also be resorted to upon others to enable the representative to escape from his just responsibilities. Yet, however profoundly impressed the judicial mind may be in any given instance with its impropriety and inexpediency, it will not do to say that for that cause the law may be set aside. This would but be for the judiciary to set itself up as a revisory body upon the acts of the General Assembly and would be a plain usurpation upon the powers conferred upon the body. \* \* \* How great soever the evil may be, the security against it must be sought in the wisdom and integrity of the legislative body, or, failing these, the corrective will be found in the virtue and intelligence of the people."

No matter how ingeniously arranged may be the checks and

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limitations imposed by Constitutions, the point will at last be reached where confidence must be reposed, and wherever that occurs there is danger of its abuse. It is impossible in a Constitution, however elaborate, to provide for every contingency; something must be left to the discretion of those entrusted with the conduct of government. The General Assembly, the direct agent and representative of the sovereignty of the people, is the natural and necessary repository of power, to be exercised at its discretion for the general good, except as the people have seen fit, in express terms or by necessary implication, to impose limitations and restraints. Any other conclusion is founded upon distrust of the people and their representatives.

We are of opinion that the act under which the election was held is not repugnant to the Constitution of the State, but is a valid exercise of legislative power, and that the judgment of the corporation court of the city of Fredericksburg must be reversed.

HARRISON, J., dissenting:

I cannot concur in the opinion of the majority of the court in this case.

A great jurist has said that, in construing Constitutions, "every word employed in the Constitution is to be expounded in its plain, obvious and common sense meaning, unless the context furnishes some ground to control, qualify or enlarge it. Constitutions are not designed for metaphysical or logical subtleties; for niceties of expression; for critical propriety; for elaborate shades of meaning; or for the exercise of philosophical acuteness or judicial research. They are instruments of a practical nature, founded on the common business of life, adapted to common wants, designed for common use, and fitted for common understandings. The people make them; the people adopt them; the people must be supposed to read them with the help of common sense, and cannot be presumed to admit in

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them any recondite meaning, or any extraordinary gloss." Dwarris on Statutes and Constitutions, p. 675, quoting from Judge Story.

The constitutional convention performed the paramount work for which it was assembled when it reformed and defined the electorate of Virginia. In the preparation of article two of the Constitution, the mind of the convention was addressed to and absorbed with the responsible duty of determining upon the character and qualifications of those who should constitute our future electorate. After this work had been satisfactorily accomplished, the convention turned its attention to a consideration of the elections to which the new electorate should apply, and this important question was settled by the adoption of section 18 of the schedule, which provides that, "In all elections held after this Constitution goes into effect, the qualifications of electors shall be those required by article two of this Constitution."

There is no ambiguity about this language. It has no recondite meaning. The convention expresses its purpose in terms that cannot be misunderstood when it declares, that *in all elections held after this Constitution goes into effect, the qualifications of electors shall be those required by article two of this Constitution.*

This court has said that "all" is the most comprehensive word in the English language. I am aware of no canon of construction which authorizes any meaning to be given to this provision, other than that which its plain and simple language imports. Section 18 of the schedule is conceded to be a part of the Constitution. It must, therefore, be given the same force and effect that is attributed to any other provision of the instrument. When it is read in connection with article two and other provisions of the Constitution, the conclusion is, to my mind, irresistible that the convention did not intend to leave the legislature with power to prescribe the qualifications of the electorate in all special elections held in this Commonwealth.

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It is said that section 62 of the Constitution is authority for the legislature to provide an electorate in local option elections, with other qualifications than those prescribed by article two of the Constitution.

Section 62 is as follows: "The General Assembly shall have full power to enact local option or dispensary laws, or any other laws controlling, regulating, or prohibiting the manufacture or sale of intoxicating liquors."

The expression "local option laws," employed in this section necessarily implies local option elections, the purpose of a local option law being to provide for holding local option elections. The convention had already determined upon the qualifications that the future Virginia electorate should possess, and there is, in my opinion, nothing in this section that warrants the view that the convention intended thereby to leave the legislature with unrestrained power to create any electorate, with or without qualifications, that to it might seem proper in local option elections. The purpose of the provision was merely to emphasize the fact that the Convention did not intend to restrict the power the legislature had always possessed to control and regulate the manufacture or sale of intoxicating liquors. The language employed, I think, excludes the idea that it was intended to engraft upon the provision already adopted, which prescribed the qualifications of the electorate, an exception in favor of local option elections. What reason could there have been for not having as pure an electorate to determine the question of local option as was required to settle any other question that might be submitted to the voters of a community?

The General Assembly of 1904, which put the Constitution into operation, as to all special elections, provided that the qualification of voters in all special and local option elections should be those prescribed by article two of the Constitution, thereby placing upon the Constitution the meaning so plainly pointed out by section 18 of the schedule. Acts 1904, p. 213. The legislature of 1908, by the act now under consideration.

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amended the act of 1904, so as to reduce the measure of qualification from the standard prescribed by the Constitution in the case of special and local option elections. After prescribing what the qualifications of voters should be at any special election or any local option election, the act proceeds to define its meaning as follows: "The term special election, as used in this section, shall be construed to include such elections as are held in pursuance of a special law as well as such as are held to fill a vacancy in any office, whether the same be filled by the qualified voters of the State, or of any county, corporation, magisterial district or ward." So that under this act, the constitutionality of which is attacked, the legislature assumes the power to prescribe a different qualification for voters from those prescribed by the fundamental law, not only in local option elections but in all special elections, including such as may be held to fill vacancies in office. Acts 1908, p. 83.

By section 30 of article II of the Constitution, the legislature is given power, under stated circumstances, to enlarge the qualifications of the electorate by adding a property qualification of \$250; but not in line or word do we find an intimation that it can, under any circumstances, diminish the qualifications prescribed by the Constitution.

Special elections are, in most cases, of much greater interest and importance to those immediately concerned than are elections involving the selection of public officials, and there was, at least, as much reason and necessity for throwing the protection of a purified electorate around the interests involved in those elections, as there was to prescribe limitations and restrictions for the qualification of voters who were to participate in the election of public officers.

It is insisted that the act in question was necessary to avoid inconvenience as to the time of holding special elections; that without the act, under the constitutional provision requiring the six months' prepayment of poll tax, special elections could not be held except during a portion of the year.

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I do not so understand the present laws on the subject. The right of suffrage, under our Constitution, is a privilege. It is not compulsory. Every citizen who possesses the prescribed qualifications has the right to cast his ballot, but he must first qualify himself, and that is a matter that rests with him, depending upon his own voluntary act. One of the essentials of his qualification as a voter is, that he shall have personally paid, at least six months prior to the election, all State poll taxes assessed or assessable against him, under the Constitution, during the three years next preceding that in which he offers to vote. The three years next preceding that in which he offers to vote plainly refers to the three *tax years* preceding that in which he offers to vote. The tax year commences on February first and ends on February first of each year. By section 491 of the Code, it is made the duty of the commissioner of the revenue to ascertain and assess all male persons of full age and sound mind residing in his district on the *first day of February in each year*. It is to my mind clear, that under existing tax laws any voter who pays his poll taxes on any day prior to the first day of August in any year can vote in every election held on any day in the next succeeding year, beginning on the first day of February and ending the following February. For example, if the poll tax is paid before the first day of August, 1908, the voter so paying is entitled to vote in any election held in any month or on any day of the month during the year beginning February 1, 1909, and ending the first day of the following February. Hence, every voter can qualify himself to vote in all elections by paying his poll tax prior to the first day of August in each year.

But, it is said, the treasurer may not be ready to receive the poll taxes prior to the first day of August. No reason is perceived why he should not be. If, however, any such inconvenience should arise under the existing laws, the legislature has the power to modify those laws so as to remedy the inconvenience. The laws should be made to yield to the Constitution and not the Constitution to the laws.

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That the Constitution contemplates other elections than those held for the election of officers and members of the General Assembly fully appears from numerous sections of that instrument. I will advert to two by way of illustration.

Section 98 provides for special elections to determine the question of abolishing the corporation courts in cities of the second class, by the *qualified* electors of such cities.

Section 127 provides for an election to determine the issue of bonds by a city, by a majority of the *qualified* voters of such city, either at a general or special election for that purpose.

Can it be doubted that the *qualified* voters mentioned in these provisions for *special* elections means voters who are qualified in the manner prescribed by article two of the Constitution? And when the Constitution, in a subsequent provision, says: "*In all elections held after this Constitution goes into effect, the qualifications of electors shall be those required by article two,*" is there room to doubt that it was intended to embrace the special elections which it expressly mentions and provides shall be submitted to the *qualified* voters?

Much is said of the provisions of former Constitutions of this State, and the powers that the legislature had under them, as bearing upon the construction of our present Constitution. No former Constitution of this State was adopted under the conditions and circumstances that surrounded her people at the time of the adoption of the present Constitution. Cases are cited construing the Constitutions of other States, as authority for the construction put upon this Constitution. I do not know the circumstances under which those Constitutions were framed, nor do I know the motives which impelled the action of the framers. These authorities can, therefore, have but little weight in determining the grave question now involved in the construction of our own Constitution.

As illustrative of the policy of the State in the past, much importance is attached to the circumstance, that the Constitution of 1869 provided that the electorate which it established should vote "upon all questions submitted to the people," and



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that seven years afterwards that provision was stricken out and the language "for members of the General Assembly and all officers elective by the people," was substituted.

The Constitution of 1869, known as the Underwood Constitution, was imposed upon an unwilling people by an alien and inimical body. It had established an ignorant and vicious electorate that was a menace to our civilization. The amendment mentioned was the first effort of an oppressed people to do what they might to relieve the situation then confronting them. With that end in view they adopted the amendment referred to, because they preferred that a democratic white legislature should prescribe the electorate which was to determine the important questions involved in special elections, rather than have such questions settled by the corrupt electorate prescribed by the Constitution of 1869. The legislature was all we had at that time, but since then the people of Virginia have framed their own Constitution and defined their own electorate, and are no longer confronted with the perils that made it necessary for them, at the time, to lodge that power in the hands of the legislature.

The present decision is far-reaching in its effect and consequences. When I recall, as I must do, the history of the times, and remember that the purpose for which the recent convention was called was primarily and above all else to release the people of this Commonwealth from the menace of a debased electorate, and to provide for them a reformed and purified electorate, I am unable to give my assent to the conclusion that those high purposes have failed, and that the right of suffrage has been left by the Constitution to the unrestrained power of the legislature to create any electorate it may see fit in all that large, important and rapidly increasing class of elections, other than general elections for members of the legislature and officers elective by the people.

For these reasons, I am of opinion that the judgment of the learned judge of the corporation court of the city of Fredericksburg is right and should be affirmed.

*Reversed.*

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Statement.

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**Richmond.**

COMMONWEALTH, EX REL. V. MANCHESTER AND RICHMOND  
FREE BRIDGE CO. AND CITY OF MANCHESTER.

March 17, 1909.

1. CORPORATIONS—*Municipal—Public—Manchester and Richmond Free Bridge Company—Legislative Control—State Corporation Commission.* The Manchester and Richmond Free Bridge Company is neither a municipal corporation nor a public institution owned and controlled by the State, in contemplation of article XII of the Constitution of this State, and hence the General Assembly had no power to pass the act approved March 5, 1908, entitled: "An act to amend and re-enact sections 3, 4, 5 and 9, of an act approved April 2, 1902, entitled: 'An act to incorporate the Manchester and Richmond Free Bridge Company,' and granting certain powers to said company, and the city councils of the cities of Richmond and Manchester, for public purposes." This power is vested in the State Corporation Commission.

Error to a judgment of the Corporation Court of the city of Manchester upon a petition filed asking liberty "to file an information in the nature of a writ of *quo warranto*." Judgment for the defendant. Petitioners assign error.

*Reversed.*

The original act chartered the Free Bridge Company, defined its power and duties, and authorized the cities of Richmond and Manchester or either of them to guaranty its bonds. The act of 1908, passed after the present Constitution went into

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effect, amended certain sections of the charter, but still retained the guaranty feature above mentioned. The constitutionality of the latter act was assailed on several grounds. Among them:

"Because the said act of March 5, 1908, is unconstitutional, null and void, as by section 156 (a), article XII of the Constitution of Virginia, the power and authority to create and establish such a corporation as said Manchester and Richmond Free Bridge Company is distinctly taken from the General Assembly and vested in the Corporation Commission of this State."

There was a demurrer to the petition which was sustained, and the petition dismissed.

The following is a copy of the order of dismissal:

"This day came again the parties, by their attorneys, and the court having maturely considered the various matters of law arising upon the demurrers interposed by the defendants, is of opinion as follows:

First. That the Manchester and Richmond Free Bridge Company was, under the terms of the original act of the General Assembly of April 2, 1902, distinctly a *public* corporation, municipal in its character, and that the General Assembly, therefore, had full inherent power, notwithstanding the provisions of article XII of the Constitution, to pass the amendatory act of March 5, 1908.

Second. That said act of March 5, 1908, is not an act in relation to the government of the city of Manchester, within the intent and meaning of section 117 of the Constitution.

Third. That the bonds of the Manchester and Richmond Free Bridge Company, if guaranteed by the city of Manchester under the terms of the aforesaid original and amendatory acts, will not constitute a part of the bonded indebtedness of the city of Manchester within the intent and meaning of section 127 of the Constitution.

Wherefore, it is considered, adjudged, and ordered that the said demurrers be sustained, that leave to file the information

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against the defendants as prayed be denied, and that the petition of the relators be, and the same is hereby, dismissed with costs."

*David L. Pulliam*, for the plaintiff in error.

*Charles L. Page*, for the defendant in error.

BY THE COURT:

This day came again the parties, by counsel, and the court having maturely considered the transcript of the record of the order aforesaid and arguments of counsel, is of opinion, that the Manchester and Richmond Free Bridge Company is neither a municipal corporation nor a public institution owned or controlled by the State in contemplation of article twelve of the Constitution of Virginia and that consequently the General Assembly had no power to pass the act approved March 5, 1908, entitled, "An act to amend and re-enact sections 3, 4, 5 and 9 of an act approved April 2, 1902, entitled: An act to incorporate the Manchester and Richmond Free Bridge Company, and granting certain powers to said company, and the city councils of the cities of Richmond and Manchester for public purposes."

And the court being further of opinion that the Corporation Court of the city of Manchester erred in sustaining the demurrer to the petition for a *quo warranto*, doth so decide and declare. It is therefore considered that the said order be reversed and annulled, and that the plaintiff in error recover of the defendants in error her costs by her expended in the prosecution of her writ of error and supersedeas aforesaid here.

And this court proceeding to enter such order as the said corporation court ought to have entered, it is considered that

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the demurrer to the petition be overruled and leave granted the relators to file the information against the defendants as prayed for; and the cause is remanded to the said corporation court for further proceedings not inconsistent with this order.

Which is ordered to be certified to the said corporation court.

*Reversed.*

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Statement.

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**Richmond.**

TILTON AND OTHERS v. HERMAN, TREASURER AND OTHERS.

March 24, 1909.

1. ELECTIONS—*Payment of Poll Tax—Treasurer's List.*—The decision of this court in *Tazewell v. Herman*, 108 Va. 416, to the effect that a treasurer of a city or county should embrace in the list which he is required to file with the clerk the names of only such persons as have *personally* paid their poll taxes within the time prescribed by law is correct, and is adhered to.
2. ELECTIONS—*Poll Tax—"Personal" Payment—Constitutional Law.*—The words "*personally paid*" as used in section 21 of article II of the Constitution of this State mean that the tax therein referred to must be paid by the voter out of his own estate or means and not by another out of that other's estate or means. The payment need not be by the voter in proper person. His bodily or physical presence is not necessary. It is enough if the payment be out of the tax payer's estate or means; and the actual payment may be by the tax-payer himself or by his check, or through the hands of his clerk or authorized agent, or perhaps in other ways.
3. ELECTIONS—*Poll Tax—"Personal" Payment—Treasurer's List.*—If a record in the treasurer's office sufficient to enable a newly elected treasurer to certify who has personally paid their poll taxes for the previous years be not kept, the legislature has the power to require such a record to be kept, but the fact that this has not been required heretofore has no bearing upon the determination of the question as to what is meant by the words "*personally paid*" or "*personally pay*" used in the Constitution.

Error to judgment of the Court of Law and Chancery of the city of Norfolk on a petition for a *mandamus*. Judgment for petitioners, awarding the writ.

*Reversed.*

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*Attorney General Wm. A. Anderson and R. Randolph Hicks,*  
for the plaintiffs in error.

*John B. Jenkins and Nathaniel T. Green,* for citizen de-  
fendants in error.

No appearance for Herman, Treasurer.

CARDWELL, J., delivered the opinion of the court.

This is a writ of error to the judgment of the Court of Law and Chancery of the city of Norfolk, directing, by mandamus, H. D. Herman, treasurer of that city, to include in the list required of him by law to be made and filed five months before each regular election with the clerk of the corporation court of the city only those voters who were physically present, and not all voters in his city who had paid, at least six months before such regular election, the State poll taxes required by the Constitution during the three years next preceding that in which such election is held; this case being a sequel to the case of *Tazewell et als. v. Herman, Treasurer*, 108 Va. 416, 60 S. E. 767, 61 S. E. 752, 2 Va. App. 337, recently decided by this court in which it was held that said list to be made up and filed by the treasurer should only contain the names of those persons who at least six months prior to the election had *personally* paid the poll-taxes required of them as a prerequisite to their right to register and vote at an ensuing regular election. In denying a rehearing of that decision, the court said: "What constitutes a *personal* payment, therefore, within the meaning of article II of the Constitution, was not involved in the case (*Tazewell v. Herman*), was not argued by counsel for the defendant in error, and was not considered or passed upon by the court. A failure, therefore, to pass upon that question furnishes no ground to grant a rehearing. When a case is before the court, where that question is involved, it will be con-

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sidered and decided, but until then any expression of opinion on the subject would scarcely be proper, and, at most, would be mere *obiter*."

The question not involved in that case, and, therefore, not passed upon, is the precise question presented in this; the lower court having held that the treasurer of the city of Norfolk, in making out and certifying to the clerk of the corporation court the list of persons who had paid their capitation taxes, etc., should include therein only the names of those voters "who were *physically* present when they themselves paid their poll taxes to the treasurer, and should omit therefrom the names of such persons as were not *bodily* present when their poll taxes were paid on or before the second day of May, 1908." In other words, the learned judge below held that the words "personally pay" mean payment only in *bodily* person.

The learned Attorney General, considering the public interests involved in the case to be of great moment, on behalf of those interests unites with counsel for plaintiffs in error in urging upon this court not only to review and reverse the ruling of the lower court in this case, but to review and overrule its decision in *Tazewell v. Herman, supra*.

Considering these questions in inverse order, we deem it only necessary to say with respect to the last mentioned, that this court, upon mature consideration of the reasons urged and ably argued in the present case, why the decision in the case of *Tazewell v. Herman, supra*, should be abrogated and a ruling the reverse of that therein made should be made in this case, for the reasons stated in the former opinion, as well as others which will be incidentally, but necessarily, referred to in disposing of the remaining question now before us, is of opinion that the ruling of the court upon the question involved in the former case should be adhered to, and that ruling regarded as conclusive of that question.

Coming then to the remaining question: What is meant by the words "personally paid" as used in section 20, of article II



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of the present Constitution, and "personally pay," as used in section twenty-one of the same article? In other words, does the use of these words in the Constitution, where the right of franchise is dealt with, mean that, in order to entitle a citizen of the State to register and vote, he must in person, *in bodily presence*, pay to the treasurer of his city or county the poll-taxes required of a voter as a condition precedent to the right to register and vote, or do these words mean only that the tax must be paid by the voter out of his own estate or means, and not by another out of that other's estate or means?

To determine that question, we should look to the evil which the framers of the Constitution had in view, and then to the remedy intended to be applied.

As said in the opinion in *Tazewell v. Herman, supra*, "It is manifest that one of the reasons for requiring that the voter shall personally pay his poll tax was to remedy a great evil which had prevailed at one time under the Constitution of 1869. That evil was that political and other organizations, candidates for office, and others, paid or caused to be paid, the poll tax of voters in order to improperly influence and control the votes of the persons whose tax they so paid."

That is a clear statement of the evil which our late convention sought to remedy when they came to frame article II of the present Constitution which deals with elective franchise and qualification for office; and it was unquestionably the purpose of that article to exclude from the electorate of the State that class of citizens who are not entitled to have the right of franchise by reason of not "having sufficient evidence of permanent common interest with, and attachment to, the community" (Sec. 6, Bill of Rights); and clearly a citizen who permits the poll tax required of him as well as of all other citizens of the State over the age of twenty-one years, by section 173 of the Constitution, to be paid by another for corrupt and illegal purposes, might reasonably expect to be excluded from the class of citizens declared in the bill of rights to be entitled to the

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right of franchise. And it is equally as clear to us that it was never the intent of that able body of men who framed our present Constitution to make it even possible that hundreds and thousands of the best citizens of our State may be deprived of their right of franchise, although they had paid out of their own estate or means, as contradistinguished from the means or estate of others, the poll-taxes required as a prerequisite to their right to vote, merely because they did not in *bodily presence* make the payment to the collecting officer. From such a lamentable result in thousands of instances there would be no escape, if the word "personally" used in the Constitution be restricted to "*in propria persona*."

It is true that the word "personally" may, and often does, mean *in person* and often means "*in propria persona*;" but that is not its necessary and only meaning, and many instances could be recited in which it could not be given that meaning. Suffice it to say, that the word is used in a number of our existing statutes, in which it could not with any sort of reasonableness be given the meaning which is here contended for.

The principal definition of the word "personally" given by Webster and the Century Dictionary is, "in a personal manner," and every one of ordinary intelligence understands that he does not personally or "in a personal manner" pay a debt he owes unless its payment reduces his estate or means to the extent of the payment; and that if this be not the case, but the debt be paid by another out of that other's means, such debtor could not claim that he had personally discharged the obligation. Where, however, the debtor was the source of the payment and paid the debt because he desired to discharge the obligation out of his own funds, it is, as would seem clear, a personal payment, no matter by what method or avenue the money is made to reach the hand of the creditor.

So, as would seem equally clear, where it appears that a voter was the source of the payment of the poll-taxes required of him, and paid them out of his own estate or funds because

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he wished to pay them, it is a personal payment by the voter, whether the money was handed by the voter to the treasurer, or to one of his deputies, or sent by check drawn on a bank in which the drawer has funds to meet its payment, or by the hand of the tax-payer's clerk or duly authorized agent; and a payment by a voter of his poll-tax in either of the methods mentioned other than the handing of the money himself to the treasurer, would as effectually guard against the corrupt practices which article II of the Constitution is designed to prevent as would a manual delivery of the money to the treasurer, and the voter would stand on the same footing, as far as being free from influence is concerned, in the one case as in the other, since there would be in neither case the *apprehended* ground of improper influence or control of the voter.

Any other construction of the constitutional provision would no more effectuate the intendment of the provision than the one we think is required, and certainly would be much more unreasonable, when it is remembered that if the ruling of the lower court could be upheld, many of our best citizens would, as before stated, be deprived of their right to vote, although the taxes required of them had in good faith been paid within the required time, out of their own means, and not out of the means of another; and that too merely for the reason that the voter, either by sickness, or absence miles and miles away from his home on business or perhaps in search of health, could not appear in person, "in bodily presence," and hand the money himself to the treasurer or his deputy in due time.

The answer to the argument for defendants in error, that it would be no more unreasonable to require the voter to go in person to the treasurer and pay his poll tax than to require that he go in person to register as a voter, and also when he casts his vote, is, that, in order to become a registered voter, the person offering to register has to take and subscribe a required oath, and it may be to answer interrogatories propounded to him by the registrar, which oath cannot be taken

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and subscribed, nor answer made to interrogatories propounded to him, by anyone except the voter himself; and, as voting in this State is required to be by ballot—secret ballot—*ex vi termini*, the voter must cast his ballot in person—in bodily presence. With respect to registration and voting, the requirement of bodily presence is necessary, and, therefore, reasonable; while, with respect to the payment of a tax as a prerequisite to the right to vote, it would be not only unnecessary, but unreasonable.

And the answer to the further contention, that the meaning of the words “personally pay,” applied by the learned judge below, would more surely effectuate the intention of the framers of the Constitution, is that the agent of the “political or other organizations, candidates for office or others,” spoken of by Buchanan, J., in *Tazewell v. Herman*, *supra*, would have only to stand on the outside and give to each voter, whose vote is purchasable or could be controlled, the amount of the poll-tax as he enters the treasurer’s office, and upon the voter handing the money to the treasurer he would be qualified to vote.

We are aware that the ruling of this court in the former case places a power in the hands of the treasurers which may be greatly abused, but such is the mandate of the Constitution, as it appears to us.

As said by Keith, P., in *Willis et als. v. Kalmbach et als.*, *ante*, p. 482, 3 Va. App. 205, 64 S. E. 342, handed down at the present term: “It is impossible in a Constitution, however elaborate, to provide for every contingency; something has to be left to the discretion of those intrusted with the conduct of government.”

For this very reason, no doubt, the convention, recognizing that it might be found necessary to require further evidence than that of the treasurer’s list as to the prepayment of capita-tion taxes, by section 38 of article II left that duty upon the legislature. By that section of the Constitution, as interpreted by this court in *Tazewell v. Herman*, *supra*, the treasurer is

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required to place on the list only persons who have "personally" paid the poll-taxes required of them, and paid the same at least six months prior to the date of an ensuing regular election, which it is declared shall be conclusive evidence of the facts stated in the list for the purpose of voting; and if for any reason a voter's name is improperly omitted from the list a remedy is provided by the same section of the Constitution. If the treasurer should, for an illegal and corrupt purpose, improperly place on the list the name of any person or persons not entitled to have his or their names thereon, beyond question the general laws of the State provide adequate means for the punishment of such malfeasance in office.

The suggestion, that if the treasurer is not to put on the list the names of the persons who did not in person—in bodily presence—pay their poll-taxes, the list would not afford the auditor the intended proof as to all who had paid, loses its entire force when it is remembered that the general laws make ample provision for requiring a treasurer to account for all the State's revenues he receives.

The question we are considering being one of first impression in this State, the adjudications of our court have afforded us no assistance; but the authorities from without the State sustain the view we have taken.

In *State, ex rel. Lamar v. Dillon*, 32 Fla. 545, 14 South. 383, 22 L. R. A. pp. 124, 139 (a well argued and considered case), the question involved was very similar to the one we have under consideration. The Florida law provided that the voter should qualify himself "by registering and *himself paying his own poll-taxes*," for the requisite years more than two weeks before the election and the precise question was whether the voter was required to pay those taxes in his own person, which question was decided in the negative, the opinion of the Supreme Court of Florida saying: "Our consideration of the provisions mentioned is that they do not deprive the voter of his right to pay his poll-taxes through an authorized agent, and that a pay-

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ment made by such agent would be a valid payment under the terms of the act. A liberal construction should obtain in favor of the voter's right to make the payment through another, and the act does not in terms deny such right. It is true it says 'himself paying his own poll-taxes' for the years mentioned, but the general principle, *qui facit per alium facit per se*, should apply, and the payment through an authorized agent would be the payment by the voter himself." See also sec. 110, McCrary on Elections, 15 Cyc. p. 297.

In our view, the constitutional provision aimed at that class of voters who would not manifest enough interest in the government or the welfare of the community by qualifying themselves as voters in the prescribed mode, but would be willing to exercise the right to vote as any other citizen, although their right to do so be secured by permitting another to illegally pay the taxes required of them, and for corrupt purposes, merely designed that the payment should be the personal act of the citizen—that it should be by him and with his means. If such was not the purpose, surely the real purpose would have been declared in clear, unmistakable language at the appropriate place, instead of leaving the purpose to depend upon construction.

Within this limitation, the constitutional requirement would be met in the instances we have adverted to and also where the tax is paid with the citizen's money sent to the treasurer by a member of his family, by his clerk, or other duly authorized agent, and perhaps there are other ways in which the money could be paid to the treasurer which would justify and require him to include the name of the tax-payer in the list he is required to certify to the auditor of public accounts and to the clerk of his county or corporation.

It is also claimed that this view would put the burden upon the treasurer of having to determine in every case where the payment is not made by the voter in *bodily presence*, whether the payment is out of the tax-payer's own means or out of

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means furnished by another, and that the burden could not be borne at all by a new treasurer coming into office, as he would not be able to tell who had and who had not personally paid their poll-taxes for the two preceding years.

To the first of these contentions we can only repeat, that the mandate of the Constitution requires the treasurer to include in his list all persons who have personally paid the required poll-taxes at least six months next preceding an ensuing regular election; and to the other contention the answer is that if no record be made in the treasurer's office of the payment of poll-taxes and when paid, the incoming newly elected treasurer would encounter the same difficulty in certifying these facts as he would encounter in certifying who had personally paid the two preceding years. If a record in the treasurer's office sufficient to enable a newly elected treasurer to perform these duties be not kept, it is entirely within the power of the legislature to require that such a record be kept, and the fact that this has not heretofore been required can have no sort of bearing on the determination of the question we have before us.

It follows that the judgment of the lower court complained of will be reversed and annulled, and this court will enter its judgment awarding plaintiffs in error a writ of mandamus, directed to H. S. Herman, as treasurer of the city of Norfolk, requiring him to make up, verify and file with the clerk of the corporation court of said city a list, as provided for in section 38 of article II of the Constitution, of not only persons who in bodily presence paid, but also all persons who "personally paid" to him prior to May 2, 1908, the poll-taxes required of them, as said words "personally paid" employed in said article of the Constitution are construed in this opinion; the said judgment, however, in favor of plaintiffs in error will be without costs against said H. S. Herman.

*Reversed.*

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Syllabus.

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**Richmond.**

OLIVER REFINING CO. v. PORTSMOUTH COTTON OIL REFINING  
CORPORATION, AND PORTSMOUTH COTTON OIL REFINING  
CORPORATION v. OLIVER REFINING CO.

March 24, 1909.

Absent, Keith, P., and Cardwell, J.

1. **DEMURRER—Common Counts in Assumpsit.**—A demurrer to the common counts in assumpsit, in the usual form, should be overruled.
2. **DEMURRER—Questions of Evidence.**—Whether a written agreement can be introduced to sustain a recovery under the common counts in assumpsit must be determined when the evidence is offered. The question cannot be raised by a demurrer to said counts.
3. **DEMURRER—Count Good in Part.**—An objection which, if sustained, would not vitiate the whole count cannot be made by a general demurrer to the whole count.
4. **DEMURRER—Assignment of Special Causes—Several Breaches—Some Well Assigned—General Demurrer.**—The assignment of a special cause as ground of demurrer does not narrow the scope of the demurrer. Where a count contains several breaches any one of which is well assigned, this is sufficient to maintain the action, and a general demurrer to the count should be overruled.
5. **PARTIES—Contracts by Agents—Sealed and Unsealed—Who May Sue.**—Where an agent is contracted with by deed in his own name, his principal cannot sue upon it. But where a contract not under seal is made by an agent in his own name for an undisclosed principal, either the agent or the principal may sue upon it.
6. **ASSIGNEES—Action in Name of.**—The assignee or beneficial owner of a contract may, under the express provisions of section 2860 of the Code, maintain an action thereon in his own name.



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7. **CONTRACTS—Contemporaneous Papers—Construction.**—Where two papers are executed at the same time, or contemporaneously, between the same parties, in reference to the same subject matter they must be regarded as parts of one transaction, and receive the same construction as if their several provisions were in one and the same instrument.
8. **CONTRACT PRELIMINARY TO DEED—Specific Exceptions—Presumption—Deed.**—When, to complete the performance of a prior contract and as a preliminary to a conveyance of property, parties make an agreement stipulating for the future adjustment of certain specific matters of difference between them, the law assumes that they intended that, with the exception of the things named the provisions of the contract should, in all respects, be treated as satisfied by the conveyance made.
9. **DEEDS—Acceptance—Prior Executory Contract.**—Where a deed has been executed and accepted as a performance of an executory contract for the conveyance of real estate, the rights of the parties rest thereafter solely in the deed. This is true, although the deed thus accepted varies from that provided for in the contract; and the law remits the grantee to his covenants in his deed, if there is no ingredient of fraud or mistake in the case.

Error to a judgment of the Court of Law and Chancery of the city of Norfolk in an action of assumpsit. Judgment for the plaintiff, a part of which was remitted under protest. Both plaintiff and defendant assign error.

*Reversed.*

The opinion states the case.

*C. J. Collins and Williams & Tunstall, for Oliver Refining Company.*

*Thos. H. Willcox and J. W. Willcox, for Portsmouth Cotton Oil Refining Corporation.*

BUCHANAN, J., delivered the opinion of the court.

An action of assumpsit was brought by the Portsmouth Cotton Oil Refining Corporation against the Oliver Refining

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Company. There was a verdict in favor of the plaintiff, a motion to set it aside, which was sustained upon the ground that the damages were excessive; and the trial court ordered that the verdict should be set aside and a new trial granted unless the plaintiff would remit all of its recovery except a named sum. The plaintiff remitted under protest, and a judgment was rendered for the reduced amount. To that judgment each party applied for and obtained a writ of error.

There was a demurrer to the declaration and to each count thereof, which was overruled.

The fourth was the common count in assumpsit. The other three counts were based upon the following agreement in writing:

"This agreement made and entered into this 13th day of July, 1906, by and between Oliver Refining Company (a corporation organized and existing under and by virtue of the laws of the State of Virginia), a party of the first part, and Aspegren & Co., a co-partnership consisting of Adolph Aspegren and John Aspegren, having their office in the Produce Exchange in the city of New York, witnesseth:

"The said second party has offered and does offer to the stockholders, directors and officers of the first party to purchase at and for the price of \$125,000.00 the property described as follows: All the buildings of the cooperage and refinery and the boiler house and all the machinery and fixtures therein contained, storage tanks, and thirty-one cars, railroad track and oil lands contained by a straight line running parallel to outside of railroad track of the refinery from the Norfolk and Portsmouth Belt Line Railroad, Paradise Creek, containing about seven acres of land, upon which said buildings and tracks are located, if more or less than seven acres are contained in said tract at the rate of five hundred dollars per acre shall be added to or deducted from said purchase price.

"The said first party also agrees to sell and said second party agrees to buy at its present market value, all the stock in trade,

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consisting of barrels, caustic soda, Fuller's earth and other material contained in said building and appertaining to said business and to pay therefor in cash.

"Said first party will cause a survey to be made of the lands included in this offer and will attach the same to this instrument, when presented to its stockholders, at a meeting called for the purpose of passing upon and ratifying this proposition.

"Payment of said sum of \$125,000.00, the purchase price of said property in addition to said stock in trade, shall be made as follows: \$25,000.00 thereof, in cash upon the delivery of the deed by the first party, which delivery shall be made at the office of the said second party above stated; said deed to be made to Portsmouth Cotton Oil Refining Corporation, which last named concern has been by said second party incorporated for the purpose of taking the title and issuing the securities hereinafter mentioned, said second party agrees to take all proper and necessary steps to authorize the making, execution and delivery of a mortgage of \$100,000.00 upon all of the property so transferred to it by the first party and to cause and procure the issue of \$100,000.00 six *per cent.* bonds with coupons attached conditioned for the payment of said interest semi-annually at the office of the trustee to whom such mortgage shall be made. Said mortgage and bonds to be a first lien upon all of the property of said corporation then owned by it and all improvements to or additions thereon or thereto, and the principal of said bond shall be payable in gold of standard weight and fineness in ten years from the date of such mortgage; said bonds to be in denominations as follows: 200 bonds of \$500 each.

"Said mortgage to contain provisions for the insurance and preservation of the property and all the ordinary and usual conditions attending like mortgages for securing a bond issue and shall be submitted for the approval of said first party before execution. The trustee therein shall be selected by said first party subject to the approval of said second party.

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"It is understood that a meeting of the stockholders of the said first party has been called at the office of the company in Portsmouth, Va., for Friday, July 20, 1906, for the purpose of considering this agreement and proposition with a view to ratifying the same, and authorizing the proper officers of the company to execute the necessary deeds and transfers.

"The deed of said property when executed and delivered is to be free and clear of all incumbrance and the plant to be subject to the inspection of said second party as to its condition and working order before the acceptance by them of the deed.

"The stock in trade so to be transferred shall be inventoried by said first party (and), shall be paid for at the fair market value thereof for the purposes of this agreement. It is understood that the aggregate of such stock in trade is of the value of about \$5,000.00. Plant to be in good working condition when turned over.

"It is agreed, however, that the deed to the Portsmouth Corporation shall be subject to the perpetual right to use the railroad track's scales and use of tracks leading to the tracks of the crushing plant to the party of the first part."

The object of the action was to recover damages for the alleged breach of the provision in the contract of sale, that "the plant should be in good working condition when turned over" to the plaintiff.

The first error assigned by the Oliver Refining Company in its petition for a writ of error is to the action of the court in overruling the demurrer to the declaration.

The objection made to the common counts is without merit. They are in the usual form. Whether or not the agreement upon which the other counts are based could be introduced to sustain a recovery upon the common counts, was a question to be determined upon the trial when the evidence was offered and not upon a demurrer to those counts.

The objection made to the first and second counts, that upon

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a proper construction of the agreement sued on there could be no recovery of damages against the defendant on account of losses resulting from the necessity of purchasing new presses, since the parties in entering into the agreement could not have contemplated any damage on that account, is equally without merit. Conceding for the purposes of the demurrer that this were true, there were other grounds of damage alleged, which, if sustained, by proof, would have entitled the plaintiff to recover. The demurrer to each count is a general demurrer. It goes to the whole of each count, and an objection which, if sustained, would not vitiate the whole count cannot be thus made. The assignment of a special cause as ground of demurrer does not narrow the scope of the demurrer. Where a count contains several breaches any one of which is well assigned, this is sufficient to maintain the action, and a general demurrer to the count should be overruled. See *Henderson v. Stringer*, 6 Gratt. 129; *Wright v. Michie*, Do. 354.

The other grounds of demurrer are that the agreement on its face shows that the plaintiff is not a party to it; that the provisions therein contained were not made for its sole benefit; and that there is no privity between it and the defendant. The cases of *Newberry v. Newberry*, 95 Va. 119, 27 S. E. 899, and *McIlwaine v. Big Stony Lumber Co.*, 105 Va. 613, 54 S. E. 473, are relied on to sustain this ground of demurrer.

The instrument sued on in each of those cases was under seal, and the rigid rule of the common law applied except so far as modified by statute. What is said in those cases must, therefore, be read and considered in connection with their facts. If the agreement sued on in this case had been under seal, it may be that under the principles announced in those cases the plaintiff could not maintain an action upon it, because not made solely for its benefit, even though Aspegren and Company were acting as its agents in the transaction; for it seems to be well settled at common law that where an agent is contracted with by deed in his own name, his principal can-

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not sue upon it. See Dicey on Parties, side page 134, and cases cited; Story on Agency, sec. 422, 3 Rob. Pr. (new), 34 & 37. But it is a well established rule of law that where a contract not under seal is made by an agent in his own name for an undisclosed principal, either the agent or the principal may sue upon it. *Nat'l Bank v. Nolting*, 94 Va. 263, 26 S. E. 826; 3 Rob. Pr. (new), 34; Dicey on Parties, side page 138-9; Mechem on Agency, sec. 769.

It is averred in the first count in the declaration that, in making the contract sued on, Aspegren and Company were acting for the plaintiff; that the contract was afterwards approved by the stockholders of the defendant company as a contract with the plaintiff; that it (the plaintiff) furnished the whole consideration to the defendant provided for by the contract; and that the defendant conveyed and transferred all the property mentioned in it to the plaintiff. If these averments are true, Aspegren and Company, in making the agreement sued on, were the agents of the plaintiff company, and it had the right to bring this action.

The averments of the second and third counts, if true, show that the plaintiff is the assignee or beneficial owner of the contract sued on in each of those counts, and under section 2860 of the Code it can maintain an action thereon in its own name.

We are of opinion, therefore, that the demurrer to the declaration and to each count thereof was properly overruled.

The next assignment of error which we will consider is the action of the court in refusing to permit the defendant to introduce in evidence an agreement between the plaintiff, the defendant and Aspegren and Company at the time the deed provided for by the agreement sued on was executed.

The rejected agreement commences as follows: "Memorandum.—In the matter of the purchase of certain land and personal property by Portsmouth Cotton Oil Refining Corporation from the Oliver Refining Company. The parties to this

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agreement being about to pass the deeds relating to this property, and some unsettled matters not having been provided for, it is understood and agreed that those matters" (naming them) "are to be hereafter adjusted."

Two of the unsettled matters referred to in that agreement, and which were reserved for future adjustment, were the repairs of certain tank cars and of the floor of the cooperage building. The tank cars and cooperage building are specifically mentioned in the agreement of sale and are parts of the "plant" which that agreement provided should be conveyed to the plaintiff free of all incumbrance and in good working condition when turned over, and was to be subject to the plaintiff's inspection as to its condition and working order before the acceptance of the deed.

Where two papers are executed at the same time or contemporaneously between the same parties, in reference to the same subject matter, they must be regarded as parts of one transaction, and receive the same construction as if their several provisions were in one and the same instrument. See *Harvey v. Anderson*, 10 Gratt. 386; *Torrance v. Shedd*, 112 Ill. 466-7; *Johnson v. Moore*, 28 Mich. 3, and cases cited in notes to 13 Cyc. 614.

The plaintiff having the right under its contract of purchase to inspect the plant as to its condition and working order before the acceptance of the deed, even if it were not its duty to do so, was under no obligation to accept the deed unless the plant was at that time in good working condition. It is true that the plaintiff insists that it could not ascertain whether or not the plant was in good working order until after it was conveyed and turned over to it. This contention, however, seems to contradict the language of the agreement of sale, which expressly provides for an inspection for that purpose before the acceptance of the deed.

If, when the deed was executed and delivered and the contemporaneous agreement entered into, the plaintiff did not

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intend to receive the plant as in good condition in all respects, except as to tank cars and the cooperage floor, the agreement ought and naturally would have contained some provision on that subject. When to complete the performance of a contract and as preliminary to a conveyance of the property the parties come together and make an agreement stipulating for the future adjustment of certain specific matters of difference between them, the law assumes that they intended that, with the exception of things named, the provisions of the contract should, in all other respects, be treated as satisfied by the conveyance made, especially where the contemporaneous agreement in part relates to defects in the property conveyed which the original agreement of sale provided should be in good condition when turned over, which turning over it is conceded was done when the deed of conveyance was made and the contemporaneous agreement entered into. *Distrow v. Harris* (N. Y.), 25 N. E. 356.

The general rule is and no rule is better settled than that where a deed has been executed and accepted as a performance of an executory contract to convey real estate, the rights of the parties rest thereafter solely in the deed. This is true although the deed thus accepted varies from that provided for in the contract, and the law remits the grantee to his covenants in his deed, if there is no ingredient of fraud or mistake in the case. 2 Devlin on Deeds, sec. 850-a; *S. V. R. Co. v. Dunlop*, 86 Va. 346; *Trout v. N. & W. Ry. Co.*, 107 Va. 576, 1 Va. App. 636; note to *Clifton v. Jackson*, 16 Am. St. Rep. 621.

Whether the deed of conveyance executed in this case and accepted by the plaintiff, in the absence of the contemporaneous agreement, would have come within the general rule and rendered the executory contract sued on *functus officio* by merger, and have furnished the only evidence of the rights of the parties, as is argued by counsel for the defendant, need not be considered as that is not this case.

The action of the court in refusing to admit the contem-



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poraneous agreement in evidence was error for which its judgment must be reversed.

The defendant assigns other errors, but as they are such as are not likely to arise upon another trial or depend upon the evidence in the case, which will be different, it is unnecessary to consider them.

It follows from what has been said in disposing of the defendant's assignments of error that the plaintiff was not prejudiced by the action of the court in requiring it to remit a part of its recovery, and that its assignment of error is without merit.

The judgment must be reversed, the verdict set aside, and the cause remanded for a new trial not in conflict with the views expressed in this opinion.

*Reversed.*

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Syllabus.

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**Mytherville.**

## ATLANTIC COAST LINE RAILROAD CO. v. BRYAN.

June 10, 1909.

**1. CARRIERS—Loss of Goods—Presentation of Claim—Time Limit.—**

The provision of a bill of lading that claims for loss or damage must be made in writing to the agent of the carrier at the point of delivery promptly after arrival, and fixing a limitation of thirty days after delivery, or after due time for delivery, within which such claim shall be presented, is a reasonable one, and, unless waived, is enforceable by the carrier in bar of any action by the shipper for such loss or damage.

**2. WAIVER—Contract—Estoppel.—**

A waiver, to operate as such, must arise either by contract, or by estoppel. If by contract, it must be supported like any other contract, by a valuable consideration. If estoppel by conduct is relied on, the party sought to be estopped must have caused the other party to occupy a more disadvantageous position than he would have occupied but for that conduct.

**3. CARRIERS—Lost Goods—Failure to Present Claim in Time—Vested Right of Defense—Subsequent Attempt to Find Goods—Waiver—Case at Bar.—**

An attempt by a carrier to find a lost shipment after its exemption from liability has attached and become a vested right by reason of the failure of the shipper to present a claim therefor within the time and at the place stipulated for in the bill of lading, does not constitute a waiver of its right to claim such exemption, if the goods should not be located. A waiver, to be available, must be made with full knowledge of the rights intended to be waived, and the intention to waive them must be made to appear plainly. In the case at bar it is held that a letter from the carrier's agent, after exemption from liability had attached, requesting "the affidavit of the packer of the case, also invoice showing the original cost of the articles," and stating that promptly upon the receipt of these documents the matter will receive attention, did not constitute a waiver of the carrier's exemption from liability, nor estop it from relying on its exemption as a defense.

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Error to a judgment of the Court of Law and Chancery of the city of Norfolk in an action of assumpsit. Judgment for the plaintiff. Defendant assigns error.

*Reversed.*

The opinion states the case.

*D. Tucker Brooke* and *W. B. McIlwaine*, for the plaintiff in error.

*Thos. H. Willcox*, for the defendant in error.

HARRISON, J., delivered the opinion of the court.

This action was brought by J. A. L. Bryan to recover of the defendant company damages for the loss of a box of clothing shipped by him from Norfolk, Va., to one George Washington, at Dudley, N. C., a station on the line of the defendant company. The whole matter of law and fact was submitted to the court, and judgment given in favor of the plaintiff for \$463.32, the amount alleged in the declaration as the value of the articles lost.

The record shows that George Washington, a negro farmer of moderate means, residing about one mile from Dudley, N. C., had his house destroyed by fire in March, 1907; that he wrote to the plaintiff, a negro tailor and clothes presser at Norfolk, who had married his niece, informing him of the fire; that on May 11, 1907, the plaintiff shipped the box of clothes, weighing 200 pounds, to George Washington, as consignee, and that the same was lost, how or when is not explained. The only evidence of the contents of this lost box is that of the plaintiff, who says that it contained thirteen coats and vests, and eight pairs of pants, in addition to five complete suits of clothes, five pairs of shoes, four overcoats, five hats, eight undershirts, two lady's skirts, a silk shirt waist, a lady's hat, and a

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box of cigars valued at \$7.00; the whole aggregating in value \$463.32, the amount sued for. The testimony is that these goods were all new; the clothes being made in the plaintiff's shop. The plaintiff, further testifying, estimates the entire value of his stock at the time of this voluntary gift to his wife's uncle at \$1,800 or \$1,900, so that he was giving away about one-fourth of his entire stock, without, according to his own testimony, being familiar with the necessities of the family he was attempting to help, and without knowing accurately the number or ages of the persons who were to be the beneficiaries of his generosity.

The first assignment of error is that the court erred in holding that the defendant company waived its right to rely on the provision in its bill of lading relieving it from liability, unless claim for loss was made in writing, at the point of delivery, within thirty days after due time of delivery.

The bill of lading which was given for the shipment in question contained the following provision: "Claims for loss or damage must be made in writing to the agent at the point of delivery promptly after the arrival of the property, and if delayed more than thirty days after the delivery of the property, or after due time for delivery thereof, no common carrier hereunder shall be liable in any event."

This condition has been held by this court to be a reasonable one, and enforceable by the carrier in bar of any suit brought by the shipper for the loss of goods for which claim was not presented as provided in the bill of lading containing such provision. *Liquid Carbonic Co. v. N. & W. Ry. Co.*, 107 Va. 323, 58 S. E. 569, 13 L. R. A. (N. S.) 753.

A waiver, to operate as such, must arise in one of two ways: either by contract, or by estoppel. If by contract, it must be supported by a valuable consideration; that is, such consideration as will support any other contract. 28 Am. & Eng. Enc. of L. (1st ed.), 531, and notes.

There can be no contention in the present case that there was any agreement on the part of the defendant company, founded

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on valuable consideration, to waive the right now relied on. We shall, therefore, confine our attention to a consideration of the contention that the defendant company has waived its right to rely upon the stipulation contained in its bill of lading by reason of the conduct of its agents.

In order for there to be an estoppel by conduct, the party sought to be estopped must have caused the other party to occupy a more disadvantageous position than that which he would have occupied except for that conduct.

As this court has said: "Conduct will not operate as an estoppel as against one who has not been induced thereby to alter his position to his prejudice." *Terry v. McClung*, 104 Va. 599, 52 S. E. 355; *Rorer Iron Co. v. Trout*, 83 Va. 410, 2 S. E. 713. 5 Am. St. Rep. 285.

The record shows that the shipment was made on May 11, 1907, and that the bill of lading was sent to the consignee. The shipment failing to arrive within reasonable time at the point of delivery, the consignee made inquiry and requested the agent of the defendant to trace the box, stating that he supposed its value to be \$30.00. This is all that was done at the point of delivery, where the claim for loss was required to be asserted in writing. The consignee does not pretend that he was setting up a claim for damages, but that he was merely inquiring as to the whereabouts of the box and asking that it be traced. Then the consignee sent the bill of lading to the shipper at Norfolk and nothing else was done except what took place there.

The record furnishes no sufficient proof of anything being done in Norfolk, except inquiry on the part of the plaintiff, as to the lost box, up to August 8, when a tracer was sent out to try and find the lost consignment. This was nearly three months after the shipment was made, and up to that time no claim had been filed with the company and no demand of any sort made for payment by the company. It cannot be held that this action of the company in attempting to find the lost shipment after its exemption from liability had attached under the stipulation

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of its bill of lading, was a waiver of its right to claim such exemption, if the goods should not be located. On the 8th of August, when the tracer was started, the exemption of the company from liability had become a vested right, and it was not necessary to the preservation of that right that the company should withhold its aid in the effort to find and restore the lost goods. On the contrary, it was right and proper, under the circumstances, that it should do all in its power to save the consignor harmless, and in doing so its action should not be regarded as implying an intention to waive its then vested right to the exemption.

About three weeks after this tracer was started, the plaintiff made his first claim in writing for loss of the goods in the following letter, to the agent of the defendant company, dated August 28, 1907: "Dear Sir: I beg leave to enclose herewith claim amounting to \$463.32, covering one box of clothing consigned to Mr. Geo. Washington, Dudley, North Carolina, on May 11, 1907. I have called on your people on several occasions to have the same traced, but without success. As this matter has been standing such a long time I will greatly appreciate an early settlement."

This letter indicates upon its face that it was the first time a claim was made. The writer says: "I herewith enclose claim \* \* \* I have called on your people on several occasions to have the same traced, but without success," etc.

To this letter the defendant's agent at Norfolk replied on the 5th of September, 1907, as follows: "Dear Sir: Referring to your letter of the 28th ulto., enclosing claim of \$463.32 for one box of clothing shipped May 11 to Geo. Washington, Dudley, N. C. In order to facilitate settlement of claim, I will thank you to let me have affidavit of packer of the case, also invoice showing the original cost of the articles. Promptly upon the receipt of these documents the matter will receive attention."

It is contended that this letter from the defendant's agent at

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Norfolk operates as an estoppel and constitutes a waiver of the defendant's right to rely upon its exemption.

When this letter was written, the time had long passed within which the plaintiff should have made his claim in writing for the loss of the goods, and the defendant's exemption from liability had long since attached and become a vested right. Nothing, therefore, that was said in this letter could have operated as an inducement to the plaintiff to put himself in any disadvantageous position. His position had long before become fixed with all of its attendant disadvantages. The letter could not, therefore, estop the defendant from relying on its exemption as a defense.

There is nothing in this letter that can be construed as a contract to waive the exemption, nor does it imply an intention on the part of the defendant to waive such exemption. At most, it does not do more than imply a possible willingness to treat with the plaintiff after receiving and examining the papers asked for; but this did not operate in any way to place the consignor in any worse position than he then occupied. In no view can this letter be regarded as a waiver by the defendant of its right to the exemption stipulated for in the bill of lading.

No one can be bound by a waiver of his rights, unless it be distinctly made with full knowledge of the rights he intends to waive, and the fact that he intends to waive them must be made to plainly appear. *Wright v. Agelasto*, 104 Va. 161, 51 S. E. 191.

It will be observed that the clause of the bill of lading relied on provides that the claim must be made at the place of delivery, which in this case was Dudley, N. C. Was the assertion of the claim at Norfolk, Va., the point from which the goods were shipped, a compliance with that provision? We have dealt with the case without considering that question, or intending to express an opinion upon it.

Having reached the conclusion that the defendant is not estopped to rely upon its right to the exemption from liability

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provided for in the bill of lading, it is unnecessary to consider the remaining assignment of error, that the damages awarded were excessive.

The judgment complained of must be reversed, and this court will enter such judgment as the lower court ought to have entered in favor of the defendant company.

*Reversed.*



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Syllabus.

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**Mythreille.****BROWN v. LYNCHBURG NATIONAL BANK.**

June 10, 1909.

1. **BANKS—Pass-Books and Vouchers—Duty of Depositor—Duty of Bank.**—It is the duty of a bank depositor to examine within a reasonable time and with ordinary care the account rendered in his pass-book, and the vouchers returned by the bank to him, and to report any errors discovered without unreasonable delay. The examination need not be so minute as to exclude any possibility of error, but it should be made in good faith and with ordinary diligence, and such care should be used as the circumstances of the particular case require. It is likewise the duty of the bank to keep careful and faithful accounts with its depositors, to scrutinize checks, and to exercise proper care and skill to prevent or to discover fraud.
2. **BANKS—Pass-Books—False Entries—Negligence of Depositor—Case at Bar—Estoppel—Question for Jury.**—The evidence in the case at bar makes out a case peculiarly for the determination of a jury under proper instructions from the court, and it was error for the trial court to have sustained the demurrer to the evidence tendered by the defendant. The plaintiff had been a depositor in the bank for many years and relied upon the bank to keep his account correctly, but, for three years, one or more of the employees of the bank had been engaged in systematically defrauding him, and had successfully concealed their frauds by making and rendering to him false accounts. Whether or not he was estopped to deny the correctness of the accounts as rendered by the bank from time to time should, under the circumstances, have been left to the jury.

Error to a judgment of the Corporation Court of the city of Lynchburg in an action of assumpsit. Judgment for the defendant. Plaintiff assigns error.

*Reversed.*

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The opinion states the case.

*Harrison & Long*, for the plaintiff in error.

*Wilson & Manson* and *Lee & Howard*, for the defendant in error.

KERR, P., delivered the opinion of the court.

The plaintiff in error brought this action to recover a balance alleged to be due him on a deposit account by the Lynchburg National Bank of \$3,066.20. The bank denied its liability, except for the sum of \$139.00, which amount it tendered; and as to the residue issue was joined upon the plea of *non assumpsit*. The defendant in error demurred to the evidence, and, the verdict of the jury having been rendered, the court entered judgment for the defendant, and the case is before us upon a writ of error awarded Brown.

The evidence tends to prove that the plaintiff in error had been for many years a depositor with the defendant bank; that beginning with August, 1900, and continuing until December, 1903, an employee or employees of the bank, from time to time, embezzled the funds of the bank and fraudulently entered the amounts so taken against the account of plaintiff in error. It was the custom of the bank to render monthly to plaintiff in error a statement of his account, consisting of his cancelled checks for the past month, a machine-made slip, represented to contain a list of these checks, and a statement showing the totals of debits and credits, and the balance to the credit of plaintiff in error. Brown did not keep a pass book, but relied solely on these statements rendered by the bank. His examination of these statements consisted of seeing that his checks as drawn were returned to him as vouchers, that his signature to the checks was genuine, and that the checks returned corres-

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ponded with the stubs from which they were taken, and by verifying the total debits and credits. He did not check the individual checks with the items on the machine-made list of checks, but assumed that the machine-made list of checks corresponded with the checks returned with it, and correctly represented his withdrawals from the bank, and, he did not examine it to see if it contained any item of charge against his account not represented by a check. In the method of examination he pursued, he discovered nothing about the statements of his account returned to him which put him upon notice of any wrong-doing until about the middle of November, 1903, when he received notice of an overcheck. He had received frequently within the past three years notices of overchecks, but had assumed that the bank was keeping his account honestly and correctly. At the time mentioned, however, November, 1903, the amount of the overcheck attracted his attention, and he called for his checks for the current month of November to be sent to him, and upon receiving them he made a critical examination, checking up each check with the machine-made list of checks, and discovered that the checks returned did not correspond with that list; that the list contained more items than there were checks; and that apparently some of his checks had been used as a basis of charge against his account more than once. For example, the machine-made list of checks contained two items of \$33.00 and two of \$23.75, though he had only drawn one check for each of these amounts. He proceeded to examine his account for several years back, and discovered that false entries had been systematically made from month to month, extending from August, 1900, the false entry always corresponding in amount with some check drawn by him. The sums thus withdrawn from the funds of the bank and fraudulently charged against his account amounted, with interest, to about \$3,000. The president of the bank admitted that this money had been stolen by some agent or employee of the bank.

It is difficult to conceive of a fraud more easy of detection

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than the one under investigation. As soon as a comparison was made by plaintiff in error between the machine-made slip and the checks which he had drawn, the fraud was discovered; and yet plaintiff in error had for three years accepted the bank's statements without question. If upon this evidence the case had been submitted to the jury and it had found a verdict for the defendant, it could not have been disturbed.

As was said by this court in *Bank of Richmond v. Richmond Electric Company*, 106 Va. 347, 56 S. E. 152, "a bank depositor is under obligations to the bank to examine within a reasonable time and with ordinary care the account rendered in the pass book and the vouchers returned by the bank to him, and to report any errors discovered without unreasonable delay. The examination need not be so minute as to exclude any possibility of error, but it should be made in good faith and with ordinary diligence, and such care should be used as is required by the circumstances of the particular case."

In *Leather Manufacturers' Bank v. Morgan*, 117 U. S. 96, 29 L. Ed. 811, 6 Sup. Ct. 657, a like doctrine is announced. In that case, "the main dispute," said Mr. Justice Harlan, "is as to the right of the depositor to question the account rendered by the bank, so far as it charges him with certain checks which he signed, but which, before payment, were materially altered by his clerk, without his knowledge or assent." The facts of that case are as follows: Berlin was the confidential clerk of Cooper from January, 1878, to March, 1881, and had the entire management of his office, kept his books, and had full charge of Cooper's account, as agent of Ashburner and Company, with the bank. With the full knowledge of Cooper, Berlin filled up all checks drawn upon that account, entering on the stub of the check book the date and amount of each check, the name of the payee and the purpose for which it was drawn. Pursuant to Cooper's instructions, or in the regular course of business, he filled certain checks between September 11, 1880, and February 13, 1881, which, being signed by Cooper and delivered to him,

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were altered by Berlin before they were taken from the office. The teller of the bank testified that the checks, when presented by Berlin were always carefully examined by him as to signature, amount, date and indorsement; and that there was nothing about the checks to excite suspicion or to suggest alteration or erasure. Upon the checks so altered, Berlin received from the bank the full raised amount, out of which he paid to Cooper or to his use the several amounts for which they were originally drawn, and appropriated the balance to the discharge of gambling debts which he had contracted. The entries in the check book were made by Berlin and were correct, but he forced the footings of the stubs by making false additions equal to the increase of the altered checks. Cooper's pass book was written up at the bank in October, 1880, November, 1880, and January, 1881, and balances struck showing the amounts to his credit on those dates. Upon each occasion, the book was returned with all checks that had been paid subsequent to the previous balancing, including the altered checks. Across the face of the pass book on the first balancing was written, "62 vouchers returned;" on the second, "79 vouchers returned;" and on the last, "66 vouchers returned." Each time the pass book was returned with the vouchers, Berlin destroyed such of the checks as he had altered. Berlin stated that Cooper was in the habit of examining his check book from time to time, and it is clear that the latter knew of these balancings, for he testifies that his account with the bank was balanced from time to time, which was done by the bank writing up the pass book and returning the checks that had been paid by it; that when the pass book was so returned it went to the clerk, Berlin, who then balanced the check book, that being one of the duties imposed upon him; that witness took no part in such balancings, but Berlin generally showed him the vouchers that were returned, because he liked to look at them; but he never gave Berlin any particular instructions so to do. Cooper testified, also, that he was in the habit of looking over his check book and keeping track of the

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balance; and that when he asked Berlin as to the balance his answer agreed with about what he supposed was in the bank. He also knew the object of such balancings, for he testified that he had been a dealer with the bank for upwards of eighteen years, and that he knew it was its custom, as well as the custom of all banks, to balance at intervals the pass books of its depositors and to return the same when balanced, accompanied by the checks drawn by the depositor and charged to the account, as the vouchers of the bank for such payments. Cooper states that the forgeries were discovered by him about the first or second day of March, 1881. Berlin having stayed away from the office for a day, he compared his pass book with the stubs of the check book, and ascertained that a certain number of checks appearing on the stubs were not charged against him in his pass book, and did not appear to have been returned by the bank, while others which appeared on the pass book to have been charged against and returned to him did not appear by the stub of the check book to have ever been drawn. Thereupon, he sent his pass book to the bank to be balanced, and it was balanced on March 2, 1881. Cooper admits that if on any of the several balancings he had made such examination of his check book and pass book as was done on March 1, 1881, he would have easily discovered that his account had been charged with altered checks; and that for the previous five or ten years he knew of various means adopted by bankers and merchants to prevent the raising or alteration of checks, but he had not employed or used any of them. Upon one occasion, the date not given, he discovered by adding up the footings of the check book an error, and spoke to Berlin about it. The latter having replied that it was very seldom he was caught in a mistake, Cooper believed him and looked no further into the matter.

Upon this evidence, the circuit court directed a verdict for the plaintiffs, and the case was carried to the Supreme Court of the United States upon a writ of error. Mr. Justice Harlan, in his opinion, fully discusses the authorities, and the result of

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his investigation is stated in the syllabus as follows: "When a bank depositor sends his pass book to the bank to be written up, it is his duty upon its return, either in person or by duly authorized agent, to examine the account and vouchers returned within a reasonable time, and give to the bank timely notice of any objections thereto. If he fails to do so, he may be estopped from questioning the conclusiveness of the account. If the examination is made by an agent, it must be done in good faith and with ordinary diligence; and where such agent himself commits forgeries which mislead the bank and injure the depositor, the latter is not protected, in the absence of at least reasonable diligence in supervising the conduct of the agent. In this case it was error to direct a verdict for the plaintiffs, as the questions: whether the depositor is estopped, whether the bank exercised due caution before paying the altered checks, and whether a certain check was indorsed in blank or for deposit, are for the jury." Justice Harlan concludes his opinion as follows: "It results from what has been said, that the court erred in peremptorily instructing the jury to find for the plaintiffs. Both causes of action are peculiarly for a jury to determine, under such instructions as may be consistent with the principles announced in this opinion. Whether the plaintiffs are estopped by the negligence of their representative to dispute the correctness of the account as rendered by the bank from time to time, is, in view of all the circumstances of this case, a mixed question of law and fact. As there is, under the evidence, fair ground for controversy as to whether the officers of the bank exercised due caution before paying the altered checks, and whether the depositor omitted, to the injury of the bank, to do what ordinary care and prudence required of him, it was not proper to withdraw the case from the jury."

In the case of *Brown v. Bank*, the bank demurred to the evidence, and the judgment upon the demurrer was rendered in its favor. Here too, as in the case of *Bank v. Morgan*, the

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cause of action was one peculiarly for the jury to determine, and we think that the court erred in taking it from the jury.

It is true that the fraud was perpetrated in this case in a very crude and simple manner. It is not a case of forgery, which if cleverly performed is difficult of detection, but consisted merely in making a double charge for the amount represented by a single check, which could have been detected, as the petition for the writ of error admits, by adding up the amounts on the stubs of the check book and comparing the total with the total showed on the statement of "checks as per list." As a matter of fact, as soon as plaintiff in error did this, the fraud was discovered. But, on the other hand, it is to be remembered that the bank is the debtor of the depositor, and that it is under obligation to keep careful and faithful accounts with its depositors, to scrutinize checks, and to exercise proper care and skill to prevent or to discover fraud.

It is true that the employee of the bank, in the perpetration of a fraud upon a depositor, is not the agent of the bank; but in this case, for three years, one or more employees of the bank had engaged in systematically defrauding the plaintiff in error, and in the concealment of those frauds by making and rendering false accounts.

The court is of opinion that, looking to the long course of dealing between the parties, the numerous occasions upon which the money of the bank had been abstracted and charged to the account of plaintiff in error, to the monthly accounts (more than thirty in number) rendered by the bank to plaintiff in error through its employees, to the probability that such fraudulent practices could not have been perpetrated and successfully concealed through so long a period unless participated in by more than one of the employees of the bank, and regard being had to the relations which exist between a bank and its depositors, and to the reciprocal duties owing from one to the other, it



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was a case for a jury to determine, under proper instructions from the court.

The judgment of the corporation court must, therefore, be reversed, and this court will proceed to enter such judgment as that court should have rendered.

*Reversed.*

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Statement.

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**Mytherville.**

CITIZENS BANK OF NORFOLK v. SCHWARZSCHILD AND  
SULTZBERGER Co.

June 10, 1909.

1. **BANKS AND BANKING—*Money Paid by Mistake.***—Generally, money paid under a mistake of fact may be recovered back, but the payment of a check or note by a bank upon which it is drawn, or at which it is made payable, under the mistaken belief that the drawer of the check or the maker of the note has sufficient funds to his credit to pay the check or note seems to be an exception to the general rule. Such payments cannot be recovered back. The payment is a finality, and the fact that the drawer or maker had no funds on deposit does not alter the situation.
2. **BANKS AND BANKERS—*Coupons Payable at Bank—Payment by Mistake.***—If negotiable coupons payable to bearer and possessing all the qualities and incidents of commercial paper are paid by mistake by the bank at which they are payable, there can be no recovery by the bank against the former holder of such coupons as for money paid by mistake.

Error to a judgment of the Court of Law and Chancery of the city of Norfolk in an action of assumpsit. Judgment for the defendant. Plaintiff assigns error.

*Affirmed.*

The opinion states the case.

*A. B. Seldner*, for the plaintiff in error.

*Robert W. Shultice*, for the defendant in error.

## Opinion.

BUCHANAN, J., delivered the opinion of the court.

This is an action of *assumpsit* to recover money paid by the plaintiff under an alleged mistake of fact. Upon the issue of *non-assumpsit*, the whole matter of law and fact was submitted to the court and a judgment rendered in favor of the defendant.

The material facts of the case are that on the 4th day of November, 1907, the defendant, the Schwarzschild and Sulzberger Company, a corporation, presented through the Norfolk National Bank of Norfolk, for payment, fifteen coupons of seventy dollars each, due on the first day of that month, taken from bonds held by the defendant. The bonds from which the coupons were taken were issued by the Jamestown Hotel Corporation and held by the defendant. The coupons were in the following words:

"\$70.00.

"The Jamestown Hotel Corporation will pay to bearer, at the Citizens Bank of Norfolk, Virginia, upon surrender of this coupon, seventy dollars in gold coin of the United States, on the first day of November, A. D., 1907, for one year's interest then due on its bond, No. 1.

"CHAS. M. BARNETT, Treasurer."

At the time the coupons were presented for payment at the plaintiff bank, the Jamestown Hotel Corporation, the maker thereof, had on deposit with the plaintiff the sum of \$1,898.97; but on the 16th day of the preceding month an execution creditor of the Hotel Corporation, whose judgment amounted to more than \$14,000, caused a summons on suggestion to be served upon the plaintiff bank. When the summons was served upon the president of the plaintiff bank, he notified the other officers of the bank and the bookkeeper in charge of the account not to pay out any part thereof except by order of the court. Subsequently, and before the coupons in question were paid, the

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existing account of the Hotel Corporation which had been garnisheed in the hands of the plaintiff was transferred from the active ledger of the bank to the inactive department and marked "Corp.," and a new account opened with the Hotel Corporation, then in a failing condition and being operated under the direction of the court. When the coupons were presented for payment the plaintiff bank had changed its clerks and a new clerk misread the word "Corp." for "coupons," and thinking that the Hotel Corporation's account marked "Corp." was set apart for the payment of coupons, as the bank's habit was, paid them and charged them to that account. The mistake was not known until some two weeks afterwards when the president of the plaintiff bank, in looking over the Hotel Corporation's account to ascertain the amount to its credit when the summons on suggestion was served upon him, discovered it. The plaintiff bank at once notified the defendant of the mistake, offered to return the coupons, and requested repayment, which after some months of correspondence was refused. The plaintiff bank was compelled to pay the whole \$1,898.87 in its hands when garnisheed to the execution creditor, and will lose the \$1,050 paid the defendant unless it can recover it from the defendant, as the Hotel Corporation is insolvent.

The general rule is that money paid under a mistake of fact may be recovered, but the payment of a check or note by a bank upon which it is drawn, or at which it is made payable, under the mistaken belief that the drawer of the check or the maker of the note has sufficient funds to his credit to pay the check or note, seems to be an exception to the general rule. The cases do not seem to be entirely agreed upon what principle this exception is based, but the great, if not the overwhelming weight of authority maintains this exception to the general rule. Some place it upon the ground that there is no privity between the holder of the check or note and the bank; others upon the ground that since the bank always has the means of knowing the state of the depositor's account by simply looking at its

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own books, the payment is not a payment by mistake within the meaning of the legal rule which permits a recovery; others still place their decision upon both grounds.

In *Hull v. Bank*, Dudley, 259, one of the earliest American cases that we have found, the Supreme Court of South Carolina said that "the question was one to be decided rather upon authority than general reasoning on the subject. No part of a commercial community is more interested in commercial usages than banks, and they cannot complain when they are required to strictly conform to them. They cannot always guard against fraud and imposition, but they may against mistakes depending on an inspection of their own books and accounts. \* \* \* They accepted and paid the check presented by the defendant for and on account of Hepton, the drawer, whose money they kept for his convenience and accommodation. The privity of contract was between them and their customer, Hepton, and not between them and one who may have happened in the course of dealing to present a check drawn by Hepton."

In *First National Bank v. Burnham*, 32 Mich. 328, 331, Judge Cooley said, in discussing this question: "But we think it would be an exceedingly unsafe doctrine in commercial law, that one who has discounted a bill in good faith and received in its payment the strongest possible assurance that it was drawn with proper authority, should afterward hold the money subject to such a showing as the drawee might be able to make as to the influences operating upon his mind to induce him to make payment. The beauty and value of the rules governing commercial paper consists in their perfect certainty and reliability. They would be worse than useless if the ultimate responsibility for such paper as between payee and drawee, both acting in good faith, could be made to depend upon the motive which influenced the latter to honor the paper."

In *Oddie v. National City Bank*, 45 N. Y. 735, 6 Am. Rep. 160, the court of appeals of New York (Chief Justice Church), in discussing this question said: "When a check is presented to

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a bank for deposit, drawn directly upon itself, it is the same as though payment in any other form was demanded. It is the right of the bank to reject it, or to refuse to pay it, or to receive it conditionally, as in *Pratt v. Foote*, 9 N. Y. 463, but if it accepts such a check and pays it, either by delivering the currency or giving the party credit for it, the transaction is closed between the bank and such party, provided the paper is genuine. \* \* \* The bank always has the means of knowing the state of the account of the drawer, and if it elects to pay the paper, it voluntarily takes upon itself the risk of recovering it out of the drawer's account or otherwise."

In *Manf. Nat. Bank v. Swift*, 70 Md. 515, 17 Atl. 336, 14 Am. St. Rep. 381, it was said that, if any other rule prevailed "no one could know when he could safely receive payment of a check." It is further said: "It is the duty of a bank to know the state of its depositor's account, and if it makes a mistake, it must abide the consequences. The presentation of a check is a demand for payment. If it is paid, all the rights of the payee have been satisfied and he is not entitled to ask any questions. It would forever destroy the character of a bank in all commercial circles if when it was ready and willing to pay a check, it permitted the holder to inquire if the drawer had funds there to meet it. It is a matter with which he had no concern. In the absence of fraud on the part of the holder, the payment of a check by a bank is regarded as finality, and the fact that the drawer had no funds on deposit will not give the bank any remedy against the holder."

In *National Bank of New Jersey v. Berrall*, 70 N. J. L. 757, 58 Atl. 189, 103 Am. St. Rep. 821, 66 L. R. A. 599, 1 Am. & Eng. Ann. Cases, 630, it was held that where a payee of a check, after endorsing it generally, deposits it to his account in his own bank, by which it is forwarded to the bank upon which it is drawn for collection, and the latter bank pays it by mistake, there is no privity between the paying bank and the payee to support an action by the former against the latter to recover

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the amount of the check as for money paid by mistake. It was further held in that case, that aside from the question of privity the payment cannot be said to have been made by mistake, where the alleged mistake consists in having overlooked the fact that payment of the check had been stopped; for a bank is under no legal obligation to the holder thereof to pay a check drawn upon it, and the bank being bound to know the state of its depositors' accounts, if it does make payment of a check to a *bona fide* holder who is without notice of any infirmity therein, the transaction is closed as between the parties to the payment.

Morse, in his work on banking, says without qualification, that if a bank pays or accepts a check under the misconception that it has funds it cannot recover from the holder, but it must look to the drawer alone for redress, except that under the clearing house rules a check paid through the clearing house may be returned within a certain time, if the funds are found insufficient. 2 Morse on Banking, sec. 455. See also generally *Bantench v. Dorrien*, 6 East, 199; *Levy v. Bank of United States*, 4 Dall (U. S.), 234, 1 L. Ed. 814; *First Nat. Bank v. Dimmick*, 15 Colo. 229, 22 Am. St. Rep. 394, 25 Pac. 177; *Riverside Bank v. First Nat. Bank* (C. C. A.), 74 Fed. 276, 5 Cyc. 534-5.

The coupons which were paid were payable to bearer at the plaintiff bank, and possessed all the qualities and incidents of commercial paper. (*Arents v. Commonwealth*, 18 Gratt. 750, 766-7, and cases cited.) Their payment under the facts disclosed by the record would no more entitle the plaintiff bank to recover from the defendant than if the paper paid had been the Hotel Corporation's check, bill or note. The same reasoning that applies in the one case is equally applicable in the other. If there be no privity in the one case, there is none in the other, and if the misapprehension as to the state of the maker's account is not a mistake within the meaning of the legal rule which permits a recovery, in the one case, it is equally not such a mistake in the other.

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While the reasoning of the courts in the cases quoted from, that there can be no recovery in a case like this, is not altogether satisfactory, the conclusion reached by them is sustained by the great current of authority, and seems to be in accord with commercial usage.

We are of opinion, therefore, to affirm the judgment complained of.

*Affirmed.*



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Statement.

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**Mythensville.****CITY OF RICHMOND v. MASON.**

June 10, 1909.

1. MUNICIPAL CORPORATION—*Streets and Sidewalks—Reasonably Safe Condition.*—A municipal corporation is not an insurer against all defects and obstructions in its highways, but is bound to use due and proper care to see that its streets and sidewalks are reasonably safe for persons exercising ordinary care and prudence. It is not required to have its streets and sidewalks so constructed as to secure absolute immunity from danger in using them, nor is it bound to employ the utmost care and exertion to that end.
2. MUNICIPAL CORPORATION—*Defective Highways—New Territory—Time to Repair Streets—Negligence.*—A municipal corporation is only liable for injuries resulting from defects in its streets when it has negligently failed to do that which it could reasonably be required to do under the circumstances of the particular case. If new territory be annexed to a municipality, a reasonable time must be allowed within which to put the streets and sidewalks of the new territory in a reasonably safe condition for travel, considering the subject in its entirety, and having reference to surveying, platting, grading, lighting and other things necessary to be done, and until such time has elapsed the municipality is not chargeable with negligence in that respect. What constitutes reasonable time is a question to be determined by the jury upon the evidence and proper instructions as to the law bearing thereon.

Error to a judgment of the Law and Equity Court of the city of Richmond in an action of trespass on the case. Judgment for the plaintiff. Defendant assigns error.

*Reversed.*

The opinion states the case.

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*H. R. Pollard and George Wayne Anderson*, for the plaintiff in error.

*P. H. C. Cabell and Robert H. Talley*, for the defendant in error.

KEITH, P., delivered the opinion of the court.

Mrs. Mason instituted her suit in the Law and Equity Court of the city of Richmond to recover damages for an injury sustained by her by stepping into a trench or hole in the roadbed at the point of intersection of "N" and 32nd streets, on the 14th of May, 1907. She recovered a judgment for \$1,500, and the case is before us upon a writ of error.

In the course of the trial, the city offered witnesses to prove that "it had used reasonable care to place the streets in the annexed territory (the point at which the accident happened having been in the annexed territory) in a reasonably safe condition; that previous to the recent annexation of territory shown in plaintiff's evidence, the city had under its care 116 miles of streets, and that by the annexation about 90 miles of streets had been placed under the care of the city; that these 90 miles had been previously in the county of Henrico, and were in a wretched condition for travel; that it was practically impossible, between the time of annexation, which occurred on December 6, 1906, and the time of the accident, May 14, 1907, to have so repaired and lighted the streets in said territory as to put them in the same condition of safety as the streets in the old territory of the city; that in view of the charge made in one count of the plaintiff's declaration, namely, that the city was negligent in the matter of lighting the street at the point where the accident happened, it was proposed to show that it was practically impossible, within the time during which the city had charge of the annexed territory, to erect and install a system of lighting, either gas or electricity, which would have adequately lighted

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the streets in the annexed territory; that in the old territory there were in use, approximately, 900 gas lamps and 695 electric lights; that to equally well light the annexed territory it would be necessary to install therein 574 gas lamps, and lay 74 miles of gas mains, at an aggregate cost of \$105,000, and that 443 electric lights would be necessary, at a cost of \$40,000. It was further proposed to introduce an ordinance approved January 21, 1907, in order to show that the city had promptly assumed its responsibility in the annexed territory, and had exercised its option in the matter of making a bond issue of a sum equal to 12 *per centum* of the assessed value of the real estate within the annexed territory, for the purpose of making public improvements therein." It was also proposed to introduce the city engineer, "by whom it would be shown that his department, having charge of the repair and improvement of the streets, had acted promptly and energetically in the matter of repairing and improving the streets in the annexed territory; that before the introduction of gas mains along the streets of the city it was necessary by a proper survey of the territory to prepare profiles of grades of the streets therein; that such surveys and maps were essential to ascertain the water sheds, and after the making of the surveys and maps it would necessarily require time for proper deliberation and study to fix the extent of the water shed in each particular locality; that until such surveys, maps and profiles were made, grades could not be established, and until grades were established gas mains could not be laid in the streets; that it was a physical impossibility for the city, between the time of the annexation and the happening of the accident to have placed the streets in the annexed territory in as safe a condition for the use of the public as the streets were within the old territory of the city. But the plaintiff still objected to the evidence of the witness, and also objected to the introduction of the proposed evidence on the ground that the same was irrelevant and improper; and the court sustained the plaintiff's objection to the evidence and

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refused to allow the same to be introduced, to which action of the court in refusing to allow the same to be introduced the defendant excepted, and filed its bill of exceptions. And this constitutes the first assignment of error.

It is settled law that a municipal corporation is bound to exercise due and proper care to see that its streets and sidewalks are reasonably safe for persons exercising ordinary care and prudence; but the law does not require a municipal corporation to respond in damages for every injury that may be received on a public street. The corporation is not required to have its streets or sidewalks so constructed as to secure absolute immunity from danger in using them; nor is it bound to employ the utmost care and exertion to that end. 2 Dillon on Mun. Corp. sec. 1006.

In 28 Cyc. at p. 1358, the law is thus stated: "Where a municipality is chargeable with notice or knowledge of defects or obstructions, the general municipal duty to exercise ordinary care to keep its streets in a reasonably safe condition is continuing and constant. Its liability is for negligence, however, and for negligence only. It is not liable for damages for every accident that may occur within its limits. It is not an insurer against all defects or obstructions in its streets and is not required or expected to do everything that human energy or ingenuity can do to prevent injury to the citizen; but its duty is to exercise reasonable care, and only this degree of care, to make and maintain its streets and walks reasonably safe for the purposes to which such respective parts are devoted, and for the use of persons traveling thereon in the usual modes by day or by night, and who are themselves in the exercise of reasonable care, whether the defect or condition causing the injury was created by the municipality itself or was created by some third person, or by natural causes, and should in the exercise of ordinary care have been discovered and repaired. After it has notice, either express or implied, of the existence of defects or obstructions, no matter how they were caused,

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the obligation immediately arises to exercise reasonable care to restore the street, that it may again be reasonably safe for ordinary travel. In determining whether the corporation is exercising reasonable care in the performance of its duty to make and maintain its streets reasonably safe, each case must depend upon its own surrounding circumstances; the care must be reasonable and commensurate with the danger."

Had this accident occurred on the 5th of December, 1906, defendant in error would have been without any remedy whatsoever, for the county of Henrico would not have been responsible to her in an action for damages by reason of an injury sustained on one of its defective highways. If the view of the trial court be correct, the city of Richmond became liable *eo instanti* that the annexation of this territory was consummated; so that on the 7th day of December, 1906, the city became responsible to all persons for defects in the sidewalks and streets in the annexed territory, and for any injury sustained by reason of the fact that this territory had not been properly lighted. Such a conclusion would, we think, be generally rejected as shocking to the sense of justice. But if it be not true, then it necessarily follows that the city only becomes negligent after a reasonable time has elapsed within which its duty to make its streets and sidewalks reasonably safe could have been performed; and if that be true, then it becomes a fact to be ascertained by the jury upon proper evidence and proper instructions as to the law bearing upon the evidence.

We have found no case which treats of what constitutes a reasonable time within which a city shall render streets, sidewalks and highways in an annexed territory reasonably safe for travel; but there are cases which seem to illustrate the underlying principle common to them and to the case under consideration.

Where there has been a heavy fall of snow which obstructs all the streets of a city; where it has been in part removed and a thaw sets in followed by a freeze; and in numerous other

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cases, the courts have held that a municipality cannot be charged with negligence because its sidewalks had by such causes been rendered dangerous.

In *Taylor v. Yonkers*, 105 N. Y. at p. 202, 11 N. E. 642, 59 Am. Rep. 492, it is said: "A municipal corporation is bound to keep its sidewalks safe and convenient for the passage of the public, so far as reasonable diligence and the possession of adequate resources will allow; and the application of this rule to conditions resulting from the rigors and changes of a northern winter, and to two emergencies which frequently occur, was very fairly and justly discussed and limited. It often happens that in a single day or night, every street and sidewalk in a city or village is covered with a heavy fall of snow. It is not expected and cannot be required that the corporation shall itself forthwith employ laborers to clean all the walks, and so accomplish the object by a slow and expensive process, when the result may be effected more swiftly and easily by imposing that duty upon the citizens. Each can promptly and without unreasonable burden clean the snow from his own premises, and the authorities may justly and lawfully require that to be done under the jurisdiction conferred by their charters. But though the municipality makes the necessary regulation it is not thereby relieved from responsibility. The duty remains, and it must therefore see to it that its ordinance is obeyed. It is entitled, however, to a reasonable time within which to perform the duty in the manner permitted, and is not guilty of negligence, if, observing that the work is being generally done, it awaits for a reasonable period the action of the citizens. But when such reasonable time has been given, the corporation must compel the adjoining owners or occupants to act, or do the work itself, and if it suffers the obstruction to remain thereafter, with notice, actual or constructive, of its existence, it may become responsible for injuries resulting. \* \* \* When the streets have been wholly or partially cleaned it often happens that a fall of rain or the melting of adjoining snow is suddenly

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followed by severe cold, which covers everything with a film or layer of ice and makes the walks slippery and dangerous. This frozen surface it is practically impossible to remove until a thaw comes which remedies the evil. The municipality is not negligent for awaiting that result." *Rogers v. City of Rome*, 96 N. Y. App. Div. 427, 89 N. Y. Supp. 130; *Moran v. City of New York*, 98 N. Y. App. Div. 301, 90 N. Y. Supp. 596.

There is no analogy between the facts of the cases cited and that under consideration, but they decide that the municipality is only liable for negligence, and that what constitutes negligence is a mixed question of fact and law, varying with the circumstances of each particular case; and that the municipality can only be held liable for negligence where it has failed to do that which it could reasonably be required to do, regard being had to all the circumstances by which it was surrounded.

Counsel for defendant in error say that the defect in the highway which caused the injury to her was of so trifling a character that it could have been repaired by placing a few bushels of earth in the hole or ditch into which she fell.

This is true of almost all accidents due to defects in streets and highways. Each defect in itself is trifling and its removal or repair would involve small expense; but the application of this reasoning to each particular case would render the municipality liable in all. The officials of the city charged with the duty of repairing and lighting its streets and highways must consider the duty before them in its entirety, as requiring the fixing of grades and laying of pipes and mains and the construction of sewers in accordance with a general plan or system; and could not single out this or that defect as the subject of their special care.

We are of opinion that the evidence excluded should have been admitted, to the end that the jury, under proper instructions, might have considered and decided whether or not the city of Richmond was, under all the circumstances, guilty of

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negligence in failing to render safe the roadway at the point where the injury was received.

The second assignment of error is to the refusal of the court to give an instruction which raises the same question as that which we have disposed of in dealing with the first bill of exceptions.

The case must, for the reasons already given, be reversed and remanded for a new trial. We do not deem it necessary to pass upon the third and fourth assignments of error, as upon a new trial the facts proved may differ materially from those presented in the present record.

*Reversed.*



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Syllabus.

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**Mytherville.****CITY OF PORTSMOUTH v. HOUSEMAN.**

June 10, 1909.

Absent, Keith, P.

1. **APPEAL AND ERROR—Weight Given to Verdicts—Verdict Contrary to Law.**—The jury are the triers of the facts, and also determine the credibility of the witnesses and the weight to be given to their testimony, and their findings of facts are entitled to great respect, especially when approved by the trial judge, but when the facts as found by the jury do not warrant their verdict, and the verdict is plainly against the law, it will be set aside on a writ of error from this court, and a new trial awarded.
2. **MUNICIPAL CORPORATIONS—Defective Streets—Constructive Notice—Repairs—Reasonable Time.**—A city is not an insurer of the safety of persons passing along its streets and sidewalks. It cannot be held liable in damages for an injury resulting from a defect in one of its streets or sidewalks unless it is shown that it was negligent in not repairing such defect within a reasonable time after it knew or should have known of such defect; and what is a reasonable time is a mixed question of law and fact. It is not an arbitrary right of the jury to say what is such reasonable time, but this question is to be determined from the evidence under proper instructions from the court. In the absence of all evidence of actual notice, it cannot be said that because a lid over a catch basin which had slipped eight or nine inches had so remained from twelve o'clock in the day till nine o'clock at night was sufficient to give the city constructive notice of the defect.
3. **MUNICIPAL CORPORATIONS—Defective Sidewalks—Constructive Notice—Evidence—Failure to Call Important Witness.**—It will not be presumed that the officers of a city charged with the duty of observing and reporting defects in city sidewalks neglected their duty from the fact that a patrolman on the beat where

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an accident occurred, and who was still in the employment of the city, was permitted to go beyond the jurisdiction of the court without testifying. When constructive notice of a defect in a city sidewalk is relied on, it is necessary to allege and prove by a preponderance of evidence the facts from which the notice may be reasonably presumed.

Error to a judgment of the Hustings Court of the city of Portsmouth in an action of trespass on the case. Judgment for the plaintiff. Defendant assigns error.

*Reversed.*

The opinion states the case.

*John W. Happer* and *Frank L. Crocker*, for the plaintiff in error.

*Jeffries & Lawless* and *Daniel Coleman*, for the defendant in error.

CARDWELL, J., delivered the opinion of the court.

Defendant in error, plaintiff below, instituted this action to recover of plaintiff in error, defendant below, damages for injuries alleged to have been sustained by her as the result of the negligence of plaintiff in error in not keeping its sidewalks in a reasonably safe condition for the use of pedestrians thereon.

At the second trial of the case, the jury rendered a verdict and the court entered judgment thereon against the city for \$2,500 damages; and we are asked to review and reverse that judgment on the ground that the verdict was contrary to the law and the evidence.

At the northwest corner of Columbia and Middle streets, where the alleged injuries to defendant in error were sustained, as at each of the corners at the intersection of these streets, and at other such localities in the city, the curbing of the sidewalk

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is in form circular, and at the bottom of the curbing is an opening as an outlet conducting the water from the street into the sewer under the sidewalk, the water reaching the opening in the curbing through a basin, the lower edge of which is at the bottom of the opening in the curbing and the top edge about level with the street. Just inside of the curbing of the sidewalk there is what is called a catch-basin, set back about 18 or 20 inches from the point of the curbing, these catch-basins being 36 x 42 inches, and as a covering there is an iron lid or plate which when in place makes the top of the catch-basin level with the sidewalk; and this lid or plate is only removed or displaced by the employees of the city in order to clear the sewer of obstructions to the free passage of the water into and through the sewer, and to handle this lid or plate two men are required, and when taken off an opening is left in the top of the basin about 18 x 28 inches and about 9 inches deep. There were electric street lights at each corner of the intersections of other streets with Columbia and Middle streets only one square away from the intersection of Columbia and Middle streets.

This action was brought only a day or two before it would have been barred by the statute of limitations, and after the declaration was, by leave of court, twice amended, the first amendment at the April term of the court, 1905, fixing the accident to defendant in error as of October 27, 1903, instead of September 27, 1903, as originally alleged; and the second amendment fixed the point of the accident at the northwest corner of the intersection of Middle and Columbia streets, instead of at the southeast intersections of these streets, as originally alleged.

At the second trial, which did not take place until April 21, 1908, nearly five years after the alleged accident, the evidence on behalf of defendant in error as to the facts and circumstances under which she was hurt and the extent of her injury is, in substance, as follows:

Defendant in error, a lady about 58 years of age, had been

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staying in Portsmouth about four weeks, and on the night of this accident she had been attending a religious service in a hall at the intersection of South and Middle streets, and while returning home about 9 o'clock at night, walking arm in arm with another lady, she fell into a "man-hole" on the sidewalk. In company with her at the time was the husband and the eleven-year-old daughter of the lady with whom she was walking, all of whom corroborate, in the main, her statement as to the manner of the happening of the accident. She states that the place was at the time dark, and this is the only contradiction of the evidence on behalf of the city, that the electric lights at the four corners of intersecting streets a square away were sufficient to light the street at the point of the accident.

We shall regard the injuries sustained by defendant in error as settled by the verdict of the jury, and will consider the only question in the case for determination, viz.: If the facts testified to with respect to the negligence of the city, which it is alleged caused the injury to defendant in error, be accepted as true, do those facts constitute such negligence on the part of the city that the jury were warranted in finding the verdict complained of? In other words, do the facts testified to with respect to the city's negligence render it liable in law to defendant in error for her alleged injuries?

The only instruction asked by defendant in error and given by the court dealt in a general way with the right of a pedestrian upon the streets of a city to presume that the city has done its duty in keeping its sidewalks in order, etc., and that a pedestrian exercising ordinary care in walking on a sidewalk is not required to anticipate danger or to be on the lookout for its existence, etc.; while the instructions for the city (plaintiff in error) rightly also told the jury the degree of evidence required to prove the negligence of the city; that if there was a sufficient safe space on the sidewalk at the point mentioned in the declaration for defendant in error (plaintiff) to have passed in safety by the use of ordinary care on her part, she should

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have taken the safe route; and emphasized the established principle of law, that to entitle defendant in error to a verdict for damages, she had to prove that the iron cover on the catch-basin where she alleged she sustained the injury was removed sufficiently for her to have fallen in the hole; that she did fall into it; and that this iron plate had been removed by the city, or with its knowledge, actual or constructive; and further explained to the jury that by constructive knowledge is meant that the hole in the sidewalk was so open and notorious for such a length of time before the injury that the city, by its officers and agents, should have acquired knowledge of it and repaired the defect before this accident occurred.

In our view of the case, conceding that the story of defendant in error's witness, Gilbert, as to the catch-basin being open and left open on the day of the accident, be true, the question of law for this court's determination is as stated above.

Gilbert's statement, made nearly five years after the alleged accident to defendant in error, is that on the day of the accident he was in Portsmouth to buy some furs from a colored man who attended to the Catholic cemetery; that as he passed the northwest corner of Middle and Columbia streets, about 12 o'clock M., he saw the covering of the catch-basin there was slipped eight or nine inches; and that this covering was still so slipped when he returned in the afternoon about 3 or 4 o'clock.

Middle street is shown to be one of the principal streets leading to the city market, and is traveled by large numbers of persons every day, and the only witness produced by defendant in error to testify that the covering was off the catch-basin in question, or displaced, is this witness, Gilbert, who was then a citizen of Norfolk and had been in Portsmouth only once or twice before.

We fully recognize that the jury are the triers of the facts and are the judges as to the credibility of witnesses and the weight to be given their testimony; and we also recognize the

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established rule, that the finding of the facts by the jury is entitled to great respect, and the refusal of the trial judge to interfere with the jury's finding is entitled to great weight with an appellate court in determining whether or not the judgment should be reversed; but when it is seen, as in this case, that the facts as determined by the jury do not in law fix actionable negligence upon the defendant, and that the jury's verdict in favor of the plaintiff is plainly against the law, it is the duty of this court upon writ of error to reverse the judgment of the trial court, set aside the verdict, and direct a new trial of the case.

A city cannot be held liable in damages for an injury resulting from a defect in one of its streets or sidewalks, unless it is shown that the city was negligent in not repairing such defect within a reasonable time after it knew or should have known of such defect; and what is a reasonable time is a mixed question of law and fact. It is not an arbitrary right of the jury to say what is a reasonable time within which repairs to a street should have been made, although they may from the facts and circumstances which the evidence in a particular case tends to prove, be warranted in finding that the street or sidewalk was in a defective condition, and that the accident was due to such defect. The city only becomes negligent after a reasonable time has elapsed within which its duty to make its streets and sidewalks reasonably safe could have been performed; then it becomes a fact to be ascertained by the jury upon proper evidence and proper instructions as to the law bearing upon the evidence. Still if the jury upon insufficient evidence finds the city liable for an injury, the verdict cannot be sustained. *City of Richmond v. Mason* (just decided by this court and not yet officially reported), *ante*, p. 555, 68 S. E. 8, and the authorities there cited. See also *Taylor v. Yonkers*, 105 N. Y. 202, 11 N. E. 642, 59 Am. Rep. 492; *Newport News v. Scott*, 103 Va. 794, 50 S. E. 266; *Noble v. City of Richmond*, 31 Gratt. 271, 31 Am. Rep. 726; *Burns v. City of Bradford*, 137 Pa. 361, 20

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Atl. 997, 11 L. R. A. 726; *Carom v. St. Louis*, 151 Mo. 334, 52 S. W. 210.

Upon the brief for defendant in error we are cited to a number of cases discussing and deciding as to the degree of proof required to warrant a jury in finding that the injury sued for was the proximate result of the defendant's negligence, etc., but the argument based upon those authorities loses sight of the essential feature in all cases in which damages may be recovered for an injury, viz., the *negligence* of the defendant as the proximate cause of the injury. Where there is evidence sufficient to fix upon the defendant actionable negligence, then the question whether or not it was the proximate cause of the injury becomes purely a question of fact for the determination of the jury; but where, as in this case, the jury have seen fit to disregard the instructions of the court, and have ascertained by their verdict, upon wholly insufficient evidence, that the city was guilty of negligence rendering it liable in damages, it was the duty of the trial court to set the verdict aside because contrary to the law and the evidence.

Of the five instructions rightly given for plaintiff in error, the third is as follows: "The court instructs the jury that to entitle the plaintiff to a verdict in this action, she must not only prove that the iron cover on the catch-basin was removed sufficiently for her to have fallen in the hole and that she did fall into the said hole, but they must further believe from the evidence that the said iron plate was removed by the defendant or with its knowledge, actual or constructive; and by such constructive knowledge is meant that the said hole was so open and notorious for such a length of time before the injury that the defendant, by its proper officers, exercising reasonable diligence, should have acquired knowledge of it."

There is not a semblance of evidence in this case tending to prove that the city's officers or agents opened the catch-basin on the day of this accident, or that the city or either of its officers or agents had actual knowledge of it having been left

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open; but upon the evidence alone of the witness, Gilbert, testifying under the circumstances stated, that he saw the covering of the catch-basin slipped eight or nine inches at about 12 o'clock M., and again between 3 and 4 o'clock P. M., the verdict of the jury in effect finds that the city should have known that this covering of the catch-basin was so slipped and had it put back in its proper place before 9 o'clock that night, the hour at which this accident occurred, and that finding too in the face of the testimony of four reputable citizens, examined as witnesses for the defense, three of whom state positively that there was no opening in the top of the catch-basin at the time Gilbert says there was, and all say that if there had been such an opening as Gilbert said there was, they would certainly have observed it; and one of these witnesses had passed that point eight times on the day of this accident, and another, Mrs. Martin, lived in the house at the northwest corner of Columbia and Middle streets, within thirty feet of this catch-basin, and kept watch, she says, of the condition of the street near her house for the reason that her little children often played therein.

We can attach no importance to the argument of counsel for defendant in error that because it was "shown by the city's chief and assistant chief of police and a patrolman that the scene of the accident was within the beat of one of the patrolmen, who, although in the city's employment, was permitted to go beyond the jurisdiction of the court without testifying," etc., it should be presumed that the officers of the city charged with the duty of observing and reporting defects and obstructions in the street neglected their duty, etc. In the first place, negligence cannot in any case be presumed from the absence of evidence, but when constructive notice is relied on it is necessary to allege and prove by a preponderance of satisfactory evidence facts upon which the notice may be reasonably presumed; and in the second place, such a presumption as is argued for here could not be drawn in the face of the positive proof of the witnesses to whom we have referred that the covering



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on the catch-basin was not slipped, as stated by Gilbert, relied on to prove that essential fact, and that it could not have been slipped as he said without being observed by these witnesses.

In our view of the case, conceding that the jury had the authority to disregard the testimony of all the witnesses for plaintiff in error conflicting with that given by Gilbert, and to accept his statement as true, the facts testified to by Gilbert do not in law make a case of actionable negligence essential to a recovery of damages in the case; and, therefore, the verdict rests solely upon evidence plainly insufficient to support it. Where that is the case, the appellate court, says the opinion by Whittle, J., in *A. C. L. R. Co. v. Watkins*, 104 Va. 154, 51 S. E. 172, will not hesitate to set the verdict aside. See also the authorities cited in that case, and *City of Richmond v. Mason*, *supra*, and other cases cited above.

In *Newport News v. Scott*, *supra*, the court approved the following instruction: "A city is not an insurer against accidents upon its streets, and in order to hold it liable for defects therein it must be shown that the city had actual or constructive notice of the defect which caused the accident, and had reasonable time to repair it or guard against any accident that might reasonably be expected to result therefrom, after having such notice; and that by constructive notice is meant that the defect by which the injury is alleged to have been caused had been so open and notorious and continued for such a length of time before the injury that the city, by its proper officers, exercising reasonable diligence, should have acquired knowledge of such defect."

In *Burns v. City of Bradford*, *supra*, the facts out of which the action arose are quite similar to the facts of this case, and the Supreme Court of Pennsylvania said: "A municipal corporation is not an insurer against all defects in its highways, but it is answerable for negligence in the performance of its duties in the construction and care of them. For a defect arising in them without its fault or neglect, it is not liable, unless it has express notice, or the defect be so notorious as to be evident

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to all passers. If a defect is such that it is discovered by only one of a thousand or more persons who pass it in the ordinary pursuit of business or pleasure, can it be said to be notorious, or such a defect as the municipality is bound to take notice of? We think not."

The uncontradicted evidence in this case is that a thousand or more persons, in the ordinary course of things, must have passed on the day of this accident along Columbia and Middle streets at the point of this accident, and only Gilbert saw the opening in the catch-basin; and it is further shown that defendant in error was not lacking in diligence to find other persons who could testify to that fact, but produced none.

It will not do to say "that the heavy cast iron of the man-hole was removed by the street hands of the city," as shown by the circumstantial evidence precluding any other theory, and, therefore, "the jury might well have so found under all the facts and circumstances." Not only is there no positive proof of that fact, as is admitted, but there is not a fact or circumstance testified to that could have warranted the jury in reaching such a conclusion. So that the verdict of the jury has to be justified, if at all, upon the theory that from 12 o'clock M. to 9 o'clock P. M. was sufficient time to warrant the jury in imputing to the city constructive knowledge that the covering on the catch-basin at the northwest corner of the intersection of Columbia and Middle streets was slipped 8 or 9 inches, and negligence in not having it replaced in time to have prevented the accident to defendant in error. We have already adverted to the view taken by this court in *City of Richmond v. Mason, supra*, and discussed the well recognized principles of law applicable to such cases.

To hold in this case that plaintiff in error was guilty of such negligence in not replacing the covering of the catch-basin, which Gilbert says he saw slipped 8 or 9 inches between 12 o'clock M. and 9 o'clock P. M., as rendered it liable in damages to defendant in error for the injuries which she alleges she

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sustained from slipping into this opening, when it is not claimed that plaintiff in error had actual notice of the opening, and only one of the thousand or more persons passing by it the day of the accident saw the opening, would be little, if any, short of subjecting a municipal corporation to a liability as an insurer against all defects in its highways.

We are of opinion that the judgment of the circuit court complained of is erroneous, and therefore it will be reversed and annulled, the verdict of the jury set aside, and the case remanded for a new trial.

*Reversed.*

Syllabus.

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**Mytherville.**

COMMISSION OF FISHERIES AND OTHERS v. HAMPTON ROADS  
OYSTER PACKERS AND PLANTERS ASSOCIATION.

June 10, 1909.

1. **OYSTERS—Surveys of Public Grounds—Conclusive Effect—Power of Legislature.**—The natural oyster beds, rocks and shoals in the bays and rivers of this State are held in trust for the benefit of the people of this State by virtue of constitutional provisions and numerous acts of assembly, and the General Assembly is vested, by the Constitution, with authority, from time to time, to define and determine such natural beds, rocks or shoals by surveys or otherwise, and has the power to declare that such surveys, made under its direction, shall be conclusive on all the courts of the Commonwealth.
2. **OYSTERS—Baylor Survey—Re-Established Lines.**—The Baylor survey and report of oyster beds, etc., and the Edmonds-Baker survey re-establishing a line or lines of the Baylor survey are each, in pursuance of legislative enactments, conclusive evidence in all the courts of the Commonwealth that the grounds within the limits of such survey and report are natural oyster beds, rocks or shoals, and that there are no natural oyster beds, rocks and shoals lying within the waters of the counties wherein such report and survey are filed other than those embraced in the survey.
3. **OYSTERS—Public Grounds—Leases—Ultra Vires Acts of Inspector.**—The public oyster grounds of this State are held in trust for the use and benefit of all the citizens of the State, and no person can, by lease or otherwise, acquire the right to use them for any purpose. The statute by which the State guarantees to the lessee of oyster grounds who pays his rent annually in advance the right to continue to use and occupy the same for twenty years, only applies where the lease is made of oyster planting grounds authorized by statute to be leased to planters, and not where the acts of the oyster inspector in making a lease were *ultra vires*.

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4. CONSTITUTIONAL LAW—*Due Process*.—"Due process of law" requires that a person shall have reasonable notice, and an opportunity to be heard before an impartial tribunal before any binding decree or order can be made affecting his right to liberty or property. In the case in judgment these requirements have been fully complied with.
5. OYSTERS—*Inspectors—Acts Ultra Vires*.—An oyster inspector is but an agent of the State to perform the duties delegated to him by statute, and all persons dealing with him are presumed to know the law, and must take notice of the extent of his authority. The State is not bound by his acts *ultra vires*.

Appeal from a decree of the Circuit Court of Nansemond county. Decree for complainant. Defendants appeal.

*Reversed.*

The opinion states the case.

W. W. Old & Son and Wm. A. Anderson, Attorney General,  
for the appellants.

Jeffries, Walcott, Walcott & Lankford, for the appellee.

CARDWELL, J., delivered the opinion of the court.

This appeal brings under review the decree of the Circuit Court of Nansemond county, perpetuating an injunction theretofore awarded on a bill filed by appellee against the Board of Fisheries of Virginia and each member thereof, and one Reps Williamson, oyster inspector of Nansemond county, restraining the appellants, each of them and their agents, etc., from requiring appellee to remove the stakes which mark the boundary of certain oyster planting ground situated in the Nansemond river in Nansemond county, occupied and claimed by appellee by virtue of successive assignments from one T. R. Gaskins and others, to whom the disputed ground was assigned in 1894 and 1895 by the then oyster inspector of Nansemond county, the

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original assignments having been made under the act of the legislature, approved March 5, 1894 (Acts 1893-4, p. 840), the area of the disputed ground being 182-29/100 acres.

There is no controversy here as to the history of appellee's claim to the grounds in dispute, the crucial question with respect to the title asserted by it being whether or not those under whom it claims ever acquired title to this ground for oyster planting purposes; it being claimed by appellants that this ground is within the lines known as the Baylor survey, and therefore under the law could not have been assigned to anyone for oyster propagation or other purpose. In other words, the questions presented on this appeal are: (1) Is the disputed ground within the Baylor survey? (2) If so, has the appellee, notwithstanding this fact, the right, as it contends, to hold the ground under its contract with the State? and (3) Has any due process of law been provided through which these questions may be heard and determined?

The learned judge of the circuit court gave the following reasons for the decree complained of:

"1. That the evidence does not show that the land of the Hampton Roads Oyster Packers and Planters Association is within the lines of the public oyster grounds of the State, commonly known as the Baylor survey.

"2. That the act of the General Assembly of Virginia, approved February 21, 1900, which appears as section 2139a of the Code of Virginia of 1904, under which petitioners sought to require the removal of the stakes of the association from said grounds, and to permit oyster tongmen to enter the same as public oyster grounds, is unconstitutional and void, in that it fails to provide any notice to be given to the planter or lessee of the property of any procedure under which his rights could be adjudicated, and fails to make provision for any adjudication of his rights after notice, and that the said act if enforced will have the effect of depriving the said association of its property without due process of law."

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The following facts appear with respect to the proceedings had before the Board of Fisheries of Virginia, and the Commission of Fisheries (appellant), the latter being the successor to the former, which proceedings culminated in the order of the appellant enjoined by the Circuit Court of Nansemond county in this cause, to-wit:

On June 20, 1904, more than ten citizens of the county of Nansemond, in accordance with section 2082b of the Code, made an application in writing to the Board of Fisheries to have the lines of the Baylor survey re-established and permanently marked in the Nineteenth district of Nansemond county, and gave bond and security as provided by said section.

On the same date, an order was entered by the Board of Fisheries appointing Fred E. Rudiger to make the survey, and on January 18, 1905, the order of June 20, 1904, was so amended as to substitute A. B. Edmonds, of Newport News, a civil engineer, in the place of Rudiger, Rudiger having been unable to make the survey owing to previous engagements, and Edmonds was ordered to proceed as soon as possible to make it.

On or before July 19, 1905, Edmonds filed his report and on that date an order was entered by the Board of Fisheries, after a hearing on the report and survey of Edmonds, relocating and re-establishing the lines of the Baylor survey in the Nineteenth district of Nansemond county, approving the report and survey; and, after reciting that the plat showed certain encroachments on the public grounds by various parties, a resolution was adopted by the board as follows:

"Therefore, be it further resolved, that all parties appearing by said plat to have encroached upon the public grounds, be notified to appear before this board at its next meeting, and show cause why said encroachments should not forthwith be declared public grounds, and their stakes upon the same be at once removed, to-wit: \* \* \* Hampton Roads Oyster Planting and Packing Company, 176 acres, \* \* \*;" the Hampton Roads Oyster Packing and Planting Company men-

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tioned being the Hampton Roads Oyster Packers and Planters Association, appellee here.

There was a hearing on the survey and report of Edmonds on August 16, 1905, all of the parties having been notified, and argument by counsel for appellee heard, whereupon the board decided it had jurisdiction in the matter, and the cause was continued to a subsequent meeting of the board to be held at Norfolk, Va., Wednesday, the 6th day of September, 1905, and all the defendants in the cause being present in person or through their attorneys waived the requirements of public notice of the proceedings.

On September 19, 1905 (the meeting of the board having been held on September 6th and continued to this date), the board after a hearing (appellee being represented by one or more of its officers and by counsel) decided that the survey filed by Edmonds on the 19th day of July, 1905, showed a much larger acreage than the plat held by appellee showing the original assignment for 216 acres of ground; and there being a contention between appellee and Edmonds as to the correctness of the survey of the grounds by Edmonds, the board directed that the matter be re-committed to Edmonds with instructions that he go upon the grounds as staked off and claimed by appellee, together with such surveyor as it should select; and that the said surveyors should retrace the work of Edmonds as to it being correct or otherwise; and, further, should survey and plat the entire number of acres of ground held by appellee under the original assignment, reproducing said original plat; and, further, to make survey of the entire holdings of the grounds of appellee, showing the entire number of acres held and the number of acres held within the Baylor survey, and make report of same to the board at its meeting to be held in Norfolk on October 18, 1905.

At the meeting of the board held on October 18, 1905, a hearing was had (appellee being represented by its officers and by counsel) on the report of Edmonds on the part of the Board of



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Fisheries, and B. P. Baker, the county surveyor of Nansemond county, on the part of appellee, as to the correctness of the survey of Edmonds filed on July 19, 1905, which survey showed an encroachment by appellee of 176 acres. The survey and report of said surveyors showed that holdings of appellee within the Baylor survey aggregated 182-29/100 acres, and the board decided that the appellee was not holding the said grounds by its own default, but by virtue of authority vested in it by the former holders thereof. After hearing evidence and argument by counsel, the board further decided that appellee had from time to time since acquiring assignment planted oysters and shells thereon, but had not acquired vested rights in the 182-29/100 acres of public grounds in question; that appellee was entitled to a reasonable time within which to remove its planted oysters and shells therefrom, as provided by statute, approved February 21, 1900, and ordered that the assignment of 182-29/100 acres of ground, shown to be within the Baylor survey, be revoked and annulled; that appellee should have until the 30th day of April, 1907, in which to remove its planted oysters from the grounds as shown by a diagram laid before the board, aggregating ... acres; that appellee should have until the 31st day of March, 1908, in which to remove its oysters and shells from the remainder of said 182-29/100 acres of grounds, aggregating ... acres, as shown by said diagram, upon which shells were planted, said removal of planted oysters and shells to be made under the terms and conditions as provided by statute; and thereafter appellee should be required to remove all stakes and obstructions from said grounds, and the same was declared to be within the Baylor survey and public oyster grounds, and to be used as such after said dates; and the board further directed the report and plat to be filed and recorded in the Nansemond county clerk's office, together with the decision as to said grounds; all of which were duly filed and recorded.

On March 30, 1906, appellee, by its attorneys, appeared before the board and asked for additional time in which to remove

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its planted oysters and shells from said grounds as regulated and fixed by the order of the 18th day of October, 1905, and the board, owing to the absence of parties and conflicting interests, declined to render any decision.

Appellee, by its officer or officers, and by counsel, again appeared before the board on March 21, 1907, and petitioned that the time to remove the oysters be extended from April 30, 1907, to April 30, 1908, every effort "having been made by it to remove the same without being able to do so;" and that matter was continued until the next meeting of the board.

On July 24, 1907, statements and arguments were made before appellant, the Commission of Fisheries, and the matter argued at length, both sides appearing by counsel, and the board recommended and ordered that the 182-29/100 acres of public oyster grounds encroached on by appellee, on which it had planted oysters, and as to which the former Board of Fisheries allowed until the 30th day of April, 1907, within which to remove said oysters, be opened to the public on September 15, 1907, and the stakes of appellee defining the same be removed and placed on the true lines of the oyster grounds which it was entitled to hold.

Thereupon, appellee on or about September 14, 1907, filed its bill in this cause, and upon the filing of this bill an injunction was awarded in pursuance of the prayer thereof enjoining appellants from removing the stakes which mark the boundary of the ground in the bill mentioned, and from taking from appellee the possession thereof, and enjoining and restraining them from taking oysters or causing same to be taken therefrom, and from in any way interfering with or molesting appellee in its possession, occupancy, use or enjoyment thereof.

On November 1, 1907, appellants filed their demurrer and also their answer in the nature of a cross-bill, and on November 4, 1907, appellee filed its demurrer and answer to the cross-bill and an amended and supplemental bill, and afterwards appellants filed their answer to the amended and supplemental bill,

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and other proceedings were had, so that on the hearing of the cause upon the pleadings and the depositions of witnesses on behalf of the respective parties, the decree under review was rendered.

Before reviewing the statutes bearing upon the issues involved, it should be noted that "the board on the Chesapeake and its tributaries" was under the statute succeeded by the "Board of Fisheries," and the latter by appellant, the "Commission of Fisheries."

By constitutional provision (section 2, article X of former Constitution, and section 175 of the present) and numerous acts of the General Assembly, the State has jealously sought to guard and protect the natural oyster-beds, rocks and shoals, in the bays, rivers, etc., of the Commonwealth, so that they may be held "in trust for the benefit of the people of this State, subject to such regulations and restrictions as the General Assembly may prescribe, but the General Assembly may, from time to time, define and determine such natural beds, rocks or shoals, by surveys or otherwise."

Deeming it necessary to define and determine the natural oyster-beds, rocks and shoals so held by the State, on February 29, 1892 (Acts 1891-2, p. 816), the General Assembly passed the act entitled "an act to protect the oyster industry of the Commonwealth," and under that act the survey known as the "Baylor survey" was made. The act, after providing that the board on the Chesapeake and its tributaries should, as soon as possible \* \* \* cause to be made a true and accurate survey of the natural oyster-beds, rocks and shoals of the Commonwealth, how the survey was to be made, the maps and charts to be prepared, returned and filed along with a report of the survey in the clerk's office of each and every county in which there was found natural oyster-beds, rocks or shoals, what the report should be, accompanied by true and accurate notes in writing of the survey, setting forth a description of the lines, with courses and distances, and a description of such landmarks as

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might be necessary to enable the oyster inspector to find and ascertain the boundary lines and limits of the natural oyster-rocks, beds and shoals, etc.; that said report should be completed and transmitted to the board of the Chesapeake and its tributaries within three months after the completion of the survey, and the board should cause the same to be published in pamphlet form and transmit copies thereof to the clerk of the county court of the counties where the charts had been filed or directed to be filed, as in the act thereinbefore provided for, the said report to be filed by the clerks of the several counties further provided: "Said survey and report, when so filed, shall be, and construed to be, in all the courts of this Commonwealth, as conclusive evidence of the boundaries and limits of the natural oyster-beds, rocks and shoals lying within the waters of the counties wherein such survey and report are filed; provided, if any natural oyster-rock, bed or shoal is left out in these surveys, they shall not be used for planting grounds, but shall be subject to the general oyster laws of the State."

The act just referred to was, on March 2, 1894, amended; the amendment, which took effect from its passage, appearing in the Code of 1904 as section 2130a, and so far as pertinent to the issues in this case is as follows: "And the said survey and report, when so filed, shall be, and construed to be, in all of the courts of the Commonwealth, as conclusive evidence of the boundaries and limits of all the natural oyster-beds, rocks and shoals, lying within the waters of the counties wherein said survey and report are filed; and shall be construed to mean in all of the said courts that there are no natural oyster-beds, rocks or shoals, lying within the waters of the counties wherein such report and survey are filed other than those embraced in the survey authorized by this act; provided that the said survey and report shall not be so construed in any pending trial or proceeding in any court upon any assignment made prior to the twenty-fifth day of February, eighteen hundred and ninety-two."

Section 2137 of the Code of 1887 relates to assignment of

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oyster planting grounds and the duties and powers of oyster inspectors, and this section was amended on February 25, 1892 (Acts 1891-2, p. 596), and sets out more fully by whom and the steps to be taken and the procedure to be had in order to obtain a lease of any part of the residue of the beds of the bays, rivers and creeks of the State in excess of what was reserved for the riparian owner, *other than the natural beds or rocks*; the duties of the oyster inspector to whom application may be made for a lease of oyster planting grounds, the number of acres which might be assigned to any one applicant, etc.; and that section was again amended on March 5, 1894 (Acts 1893-4, p. 842), but that amendment was inconsequential. Under section 2137 of the Code, *supra*, the oyster inspector himself had to locate and assign the oyster planting grounds, while under the amendments, *supra*, which were in force from their passage, the applicant himself has to give to the inspector certain information so as to enable him to survey and assign the ground applied for, and the inspector has to make the assignment, provided he ascertains it not to be natural oyster-rock, bed or shoal, *i. e.*, that the ground applied for is not, nor any part thereof, within the lines of the Baylor survey. Under this statute so amended, the assignments were made to Gaskins and others, through whom appellee claims the grounds here in question; and that they were made subsequent to the date the act and its amendment took effect is not and could not be controverted.

That the acts of the inspector in making these assignments were purely ministerial, and none the less so because he had to determine the existence of facts which made it necessary for him to act, is settled by the decision of this court in *Lewis v. Christian*, 101 Va. 135, 43 S. E. 331.

That case also recognizes that under the existing statutes the limits and boundaries of the natural oyster-rocks, beds and shoals in every county in the State are conclusively established by the survey and report made by the fish commissioners, *i. e.*

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the Baylor survey, and the report, etc., returned and filed therewith; the only question which the oyster inspector is required to determine in reference to these matters being whether a particular oyster-rock is natural oyster-rock according to said survey and report, and if so, and stakes have been placed on the natural oyster-rock or beds, it becomes his imperative duty to have them removed.

What may be the effect of the assignment of oyster grounds within the lines of the Baylor survey, whether done purposely or by mistake, is a subject more properly to be discussed in another branch of this case.

As appears in the statement above of the proceedings had before appellant, Commission of Fisheries, and its predecessors in office, A. B. Edmonds, a competent surveyor, acting on the part of the Board of Fisheries, and B. P. Baker, the county surveyor of Nansemond county, on the part of appellee, agreed that the survey previously made by Edmonds was correct, and that this survey showed an encroachment by appellee upon the grounds within the limits of the Baylor survey, re-established and permanently marked in the Nineteenth district of Nansemond county, to the extent of 182-29/100 acres, the acreage which is here the subject of controversy.

What the evidence was to substantiate the assignments to Gaskins on October 8, 1894, and to one Lilliston on the 8th of May, 1895, through whom appellee claims, does not appear in the record; so that, whether the fact, as reported by Edmonds and the county surveyor of Nansemond county, that appellee has within its grounds as staked off 182-29/100 acres of natural oyster-rock, which is really within the Baylor survey, is due to an intentional *ultra vires* act or to a mistake on the part of the oyster inspector in making the assignments to Gaskins and Lilliston, or to the moving out of the stakes marking the boundaries of the acreage within the limits of those assignments, so as to take in the disputed grounds, is not by any means made clear by the evidence before us; and perhaps this is immaterial.

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It is also to be noted that in the foregoing statement it appears that appellee, at least seemingly, acquiesced in the establishment of the lines of the Nineteenth district of Nansemond county by Surveyor Edmonds, concurred in by the county surveyor of Nansemond county, the latter of appellee's own selection, and accepted the terms of the Board of Fisheries as to the time within which the planted oysters on the disputed grounds should be removed, and did not present its bill in this cause until the day before the time allowed by the board for the removal of planted shells and oysters from the disputed ground was to expire, viz., September 15, 1907, the time originally allowed by the order of the board made October 18, 1905, having been at the solicitation of appellee from time to time extended, so that it was to expire on September 15, 1907, nearly two years after the original order was made; and the bill was only then filed by reason of the board's refusal to grant further time.

We deem it wholly unnecessary to consider the question extensively argued upon the briefs of counsel, whether or not appellee should be estopped by its acts to deny appellants' right and authority to require the planted oysters and shells upon the disputed grounds to be removed and the stakes marking the grounds moved to their proper location. In our view of the case, the right and duty of appellants to have these oysters and shells removed and the marks of the true line of the Baylor survey re-established became fixed and determined by the re-establishment by Edmonds and Baker of the limits and boundaries of the Nineteenth district of Nansemond county, as fixed by the Baylor survey.

As we have seen, the statute in its original form made the survey and the report made pursuant to the statute conclusive in all the courts of the Commonwealth that the grounds included therein are natural oyster-rocks, beds or shoals, and could not be leased to any one for oyster planting purposes; and by the amendment to the statute of March 2, 1894, *supra*, "said survey and report," when so filed, "shall be construed to mean in all

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the said courts that there are no natural oyster-rocks, beds or shoals, lying within the waters of the counties wherein such report and survey are filed, other than those embraced in the survey authorized by this act." It was plainly the intent and purpose of the legislature to make the survey and report of the limits and boundaries of the natural oyster-rocks, beds and shoals, authorized to be made, conclusive evidence in all the courts of the Commonwealth upon two propositions: first, that the grounds within the boundaries and limits of the report and survey are natural oyster-beds, rocks or shoals; and, second, that there are no natural oyster-beds, rocks or shoals, lying within the waters of the counties wherein such report and survey are filed other than those embraced within the report and survey.

The probative force and effect given to a survey and report made and filed pursuant to the statute as amended, *supra*, authorizing and requiring the making and filing of the Baylor survey, is in no degree changed or impaired by the Act of 1899-1900, as amended, and now section 2082b, *supra*, and which authorized the Board of Fisheries to re-establish the line or lines of the Baylor survey, when in the judgment of the board it became necessary. The latter act is in aid of the former, and clearly but an amendment thereto, and became an integral part thereof; therefore, a survey and report duly made and filed pursuant to the statute as amended, re-establishing a line or lines of the original Baylor survey, is entitled to the same probative force and effect in the courts of the Commonwealth as is given by statute to the Baylor survey as originally made. If this were not so, section 2082b of the Code would serve to defeat the very purpose of the legislature to locate, determine and define conclusively the boundaries and limits of the natural oyster-rocks, beds and shoals within the waters of the Commonwealth, and throw open a flood-gate of litigation with respect to such boundaries and limits whenever it might be found necessary to re-establish a line or lines of the Baylor survey, caused



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by the removal or displacement, from one cause or another, of the stakes, buoys or other marks used originally in marking and locating such line or lines.

The wisdom of the legislature in giving to a survey and report of the oyster-beds, rocks and shoals in the waters of the Commonwealth, the probative force and effect that it did, is demonstrated by the wide range this litigation and the evidence relied on in support of appellee's contentions have taken. There would be no end to litigation concerning the limits of the Baylor survey, if the appellant, the Commission of Fisheries, could be called on to litigate in the courts the correctness of every survey re-establishing a line or lines of the Baylor survey, and that question to be determined upon a mere preponderance of the evidence that might be adduced. It was plainly the purpose of the legislature to put an end to such litigation by establishing a final arbiter of all questions as to the location of a line or lines of the Baylor survey, and to relieve the officers of the State in charge of the oyster industry from litigation in the courts concerning the same.

Conceding, however, for the sake of argument, that the survey and report made by Edmonds, October 18, 1905, and verified and approved by Baker, who was selected by appellee to act on its behalf, is not to be treated as conclusively showing that the 182-29/100 acres of disputed ground is within the limits of the Baylor survey, we are nevertheless of opinion that the evidence in the case establishes the correctness of Edmonds' survey and report.

Appellee's immediate assignor of the grounds which include the disputed acreage was J. D. Armstrong, and when Armstrong made this assignment on July 1, 1903, there was no survey, the lines being given by Armstrong, or the men he had there, and this is admitted by the officers and employees of the appellee testifying in this case. When the holdings of Armstrong of 216 acres were assigned to him and Lilliston on September 1, 1895, a survey was made by P. St. J. Wilson.

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deputy surveyor of Nansemond county, which survey included the grounds assigned to Gaskins, October 8, 1894, and to Lilliston, May 8, 1895, and the testimony of Wilson clearly shows that the whole of the acreage of that survey was outside of the Baylor lines of public ground No. 1, Nineteenth district of Nansemond county. Wilson says that the southern line of public ground No. 1, viz., the line from corner No. 1 to corner No. 4, coincided with the northern line of the property surveyed by him at that time for Armstrong and Lilliston, now claimed by appellee; that he made a survey of the southern line of public ground No. 1, and located by instruments the two corners thereof, viz., corner No. 1 and corner No. 4, according to a pamphlet, entitled "Nansemond County Oyster Records, Distances, Bearings, Etc.," and a plat, entitled "James River Chart No. 4; Public Oyster Grounds, State of Virginia, 1892, Surveyed Under the Direction of J. B. Baylor, Asst. U. S. Coast Geodetic Survey" (Baylor's notes), filed with the deposition of Edmonds and verified by the witness, Smith, as being copies of the survey and report filed in Nansemond county clerk's office, June 23, 1894, pursuant to the act of February 29, 1892, as amended March 2, 1894; and that he (Wilson) then located the 216 acres outside of the lines of public ground No. 1.

Wilson is not only shown to be a surveyor of much experience, but we are unable to find any evidence in the record to refute or contradict his evidence in this respect; nor is there evidence to show that the stakes were at that time located correctly and in accordance with the survey of Wilson, he having no recollection of this fact.

Baker, who had been county surveyor of Nansemond county from 1872 to January 1, 1908, testifies that on January 23, 1900, by virtue of some court order, either of the Nansemond county court or of the Board of Fisheries, he made a survey of the Baylor line of public ground No. 1 from corner 1 to corner 4; that he and Wilson ran that line in order that the tongsers could know their line, and Armstrong's people their line; that

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he planted about twenty buoys on the line; *that Armstrong claimed in establishing these lines that they ran across two beds of his planted oysters*, and consequently he claimed beyond, he owning the property at the time of this survey of which he and Lilliston had been in possession since 1895. So that, if the stakes were correctly located on September 21, 1895, it is to be noted that their location, according to Baker's testimony, had either been changed, or if ever correctly located, were certainly not prior to January 23, 1900.

Baker was asked: "Did you find the lines and stakes there on the property owned by Mr. Armstrong within the Baylor survey?" "A. He did not have any stakes. We were to establish that line." "Q. Did you find that the property claimed by Mr. Armstrong was in the lines of the Baylor survey, or not?" "A. No." "Q. In other words, you say Mr. Armstrong had no stakes?" "A. We did not see any stakes. Mr. Armstrong was along and we did not see any stakes." "Q. Can you say by looking at this plat (an exhibit with the pleadings) the property was the same as claimed by Mr. Armstrong at that time?" "A. I can't say." "Q. In other words, you said you surveyed public ground from No. 1 to No. 4?" "A. Yes." "Q. Did you see any stakes there?" "A. There were some stakes, but I don't know anything about them. There were stakes all around, every which way, but there was nothing to designate any lines of Armstrong; and if there were, nothing was said to us. We went there under order of the court to establish the lines, and we did so."

Wilson, who made the survey of September 21, 1895 (mentioned above), further testifies that upon request he was present at the survey of January 23, 1900; that at that time, as well as he could remember, the line (meaning doubtless the line from corner No. 1 to corner No. 4) was relocated; the stakes of the property claimed by Armstrong were *within* the lines of public ground No. 1; and that he could not recall whether they were moved back into their original places on that day."

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From this evidence one of two things must be true: either that the stakes were, at the time of the survey of January 23, 1900, correctly placed along the Baylor line from corner No. 1 to corner No. 4 and afterwards moved within the lines of public ground No. 1, or the plat filed by Edmonds on October 18, 1905, showing the encroachment of 182-29/100 acres, must be incorrect.

The only testimony that the stakes were, at the time of the survey of January 23, 1900, correctly placed along the Baylor line from corner No. 1 to corner No. 4, is that of Williamson, who states that at the time they (doubtless meaning Baker, Wilson and himself) put Armstrong on the line, but he is corroborated by neither Baker nor Wilson in this statement. Baker's statement is that they placed about twenty buoys on the line, and Wilson had no recollection of this.

By concession of the general manager of appellee, the survey and location of appellee's ground by Edmonds and Baker is correct, except as to the line from corner No. 1 to corner No. 4. That this disputed line was run and rechecked by Edmonds and Baker, is testified to by both, and a very strong and significant corroboration of their testimony is to be found in the fact that appellee, upon the report of that survey, applied to the Board of Fisheries and obtained time within which to remove its planted oysters and shells within the limits of the Baylor survey; that it applied for and received, as a matter of grace, an extension of the time, and never assailed the correctness of the Edmonds-Baker survey and report in court until a further extension of time was denied by the board, and nearly two years after that plat and report had been finally acted upon by the board.

We might review the oral testimony further, but to do so would serve no purpose other than to show another demonstration of the wisdom of the legislative intention to make the Baylor survey and report, and the survey and report of a surveyor duly appointed to re-establish a line or lines of the Baylor

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survey, conclusive evidence in all the courts of the Commonwealth that the grounds within the limits of such survey and report are natural oyster-rocks, beds or shoals, and that there are no natural oyster-beds, rocks and shoals lying within the waters of the counties wherein such report and survey are filed other than those embraced in the survey.

The view that the Baylor survey, and the Edmonds-Baker survey re-establishing the lines of public ground No. 1, in Nineteenth district, Nansemond county, as surveyed and located by the Baylor survey and report, are conclusive and could not be challenged by subsequent proceedings in court, is sustained by the Supreme Court of the United States in *Gardner v. Bonestell*, 180 U. S. 362, 45 L. Ed. 574, 21 Sup. Ct. 399, where it was held: "It is a well settled rule of law that power to make and correct surveys of public lands belongs exclusively to the political department of the government, and that the action of that department within the scope of its authority, is unassailable in the courts, except by a direct proceeding. The determination by the land department in a case within its jurisdiction of questions of fact depending on conflicting testimony is conclusive, and cannot be challenged by a subsequent proceeding in the courts."

And in a still later case, *Bates & Guild Co. v. Payne*, 194 U. S. 106, 48 L. Ed. 894, 24 Sup. Ct. 595, the same court held that where the decision of questions of fact is committed by Congress to the judgment and discretion of the head of a department, his decision thereon is conclusive; and even upon mixed questions of law and fact, or of law alone, his action will carry with it a strong presumption of its correctness and the courts will not ordinarily review it although they have the power and will occasionally exercise the right of so doing. In the course of the opinion it is said: "It has long been the settled practice of this court in land cases to treat the findings of the land department upon questions of fact as conclusive, although such proceedings involve, to a certain extent, the exercise of

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judicial power. As was said in *Burfenning v. Chicago, St. Paul, &c. R. R.*, 163 U. S. 321, 41 L. Ed. 175, 16 Sup. Ct. 1018: 'Whether, for instance, a certain tract is swamp land or not, saline land or not, mineral land or not, presents a question of fact not resting on record, depending on oral testimony; and it cannot be doubted that the decision of the land department, one way or the other, in reference to these questions, is conclusive and not open to litigation in the courts, except in those cases of fraud, etc., which permit any determination to be re-examined.' " Citing with approval *Gardner v. Bonestell*, *supra*.

The second contention of appellee (*i. e.*, if it be determined that the preponderance of evidence shows that the 182-29/100 acres of disputed grounds are within the lines of the Baylor survey as re-established by the Edmonds-Baker survey), that notwithstanding such location of the grounds in dispute appellee is entitled to the use of the property, rests solely upon the doctrine of equitable estoppel, whereby the State is estopped to claim appellee's ground under the facts of this case; or else upon the erroneous theory that appellee, having acquired a lease of these grounds from the State and paid the rent therefor, has an irrevocable right to the use of the grounds for the statutory period of twenty years.

This contention leaves wholly out of view the fact that, if it be public oyster grounds, neither appellee nor its assignors ever could have acquired by contract of lease or otherwise the right to use these grounds for any purpose, but they are by law held in trust for the use and benefit of all the citizens of the State.

It is very true that section 2137a of the statute, now chapter 97 of the Code of 1904, relating to the protection of the oyster industry of the Commonwealth, contains this clause: "When the above amounts (rents for grounds leased for oyster planting purposes) are paid, then so long as the rent is paid annually in advance the State will guarantee the absolute right to the renter to continue to use and occupy the same for the period of

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twenty years thereunder acquired;" but clearly the protection of that provision of the statute only applies where the lease was made of oyster planting grounds authorized by the statutes to be leased to planters, and not where the acts of the oyster inspector in making a lease were *ultra vires*. If that were so, *i. e.*, if the lessee or renter, notwithstanding the acts of the inspector in making the lease were *ultra vires*, be entitled under section 2137a, *supra*, to hold the leased ground, why should the legislature, as a matter of grace, have authorized the officers of the State charged with the supervision and control of the oyster grounds and the oyster industry of the Commonwealth, in their discretion, to allow a reasonable time within which a renter could remove his planted oysters or shells from grounds found to have been erroneously leased to him, either by mistake or otherwise? Natural oyster-beds, rocks and shoals cannot be leased at all, or title thereto acquired, or private use thereof made, and the constitutional provision, *supra*, as well as the statutes steadfastly guard against interference with the citizens of the State in their right to take oysters therefrom, subject only to the regulations of the statutes as to season, etc.

That this has been the policy of the State steadfastly adhered to, we need only refer to the following statutes in force when the leases under which appellee claims were made and when it took an assignment of those leases: Section 1338 of the Code of 1887, provides that no grant shall be issued by the Register of the Land Office to pass any estate or interest of the Commonwealth in any natural oyster-bed, rock or shoal, whether the bed, rock or shoal ebb bare or not.

Section 2153 of the Code of 1887, as amended February 25, 1892 (Acts 1891-2, p. 595), provides that no person shall stake in or use for the purpose of planting oysters or shells, or for depositing oysters while making up a cargo for market, any natural oyster-bed, rock or shoal, or any part thereof; nor shall continue to occupy the same, if occupied and staked off; with power to the oyster inspector to remove all stakes, etc., if, after notice, the person refuses to remove same.

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And section 2341 of the Code provides that grants by the Register of the Land Office of any estate or interest in any natural oyster-bed, rock or shoal, whether the same ebbed bare or not, should be absolutely void.

The remaining assignment of error, which presents the question, whether or not the order of the Board of Fisheries directing the stakes of appellee to be removed from the grounds within the lines of the Baylor survey as re-established by the Edmonds-Baker survey and report, and the statute under which the order was made, is the taking of appellee's property without due process of law, is upon reason and authority so obviously against the contention of appellee that an extended discussion of the question is unnecessary.

It is very true that "due process of law" requires that a person shall have reasonable notice and opportunity to be heard before an impartial tribunal before any binding decree or order can be made affecting his rights to liberty or property; but this constitutional safeguard cannot avail appellee upon the uncontradicted facts as to the proceedings before the Board of Fisheries and the Commission of Fisheries touching this controversy. The proceedings were had before the Board of Fisheries and its successor in office, a department of the State government, to whose judgment and discretion the legislature has committed the supervision and control of the natural oyster-beds, rocks and shoals within the waters of the Commonwealth, as well as the oyster industry of the Commonwealth, and made the decision of that tribunal conclusive of all controversies with respect to the same. The proceedings in this case before that tribunal were in strict accordance with the requirements of the statute, and not only did appellee have reasonable notice thereof, but every reasonable opportunity to be heard and was heard from time to time before the order it now complains of was made by the board. It would be difficult to find a case in which the required "due process of law" has been more fully met and complied with.



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In the case of *Reetz v. Michigan*, 188 U. S. 505, 47 L. Ed. 563, 23 Sup. Ct. 390, in point here, the following is quoted from the opinion of Mr. Justice Matthews in *Hurtado v. California*, 110 U. S. 516, 28 L. Ed. 232, 4 Sup. Ct. 111, 292, reviewing at length the authorities and discussing the elements of due process of law: "It follows that any legal proceeding enforced by public authority, whether sanctioned by age or custom or merely devised in the discretion of the legislative power, in the furtherance of the general public good, which regards and preserves those privileges of liberty and justice, must be held to be due process of law." See also *Murray v. Hoboken L. Co.*, 18 How. 272, 15 L. Ed. 372; *Ex parte Wall*, 107 U. S. 265, 27 L. Ed. 552, 2 Sup. Ct. 569.

The principles announced in *Violett v. Alexandria*, 92 Va. 561, 23 S. E. 909, 53 Am. St. Rep. 825, 31 L. R. A. 382, have no application here. In that case, the title of the owner of the property proposed to be taken for a public use without compensation was not questioned; while here no property of appellee to which it has title or could have acquired a title or interest in is taken or proposed to be taken.

In *Richardson v. United States* (C. C.), 100 Fed. 714, the plaintiffs sued the United States for compensation for certain lands taken for public purposes by the United States in dredging out the channel of a river under the act of Congress, in which the plaintiffs claimed the right to about 40 acres of bottom assigned to them under the laws of Virginia for oyster planting purposes. It appeared that the assignment of these grounds was not made in conformity with statutory authority; and the opinion of the court, after a review of the Virginia statute, and declaring that an assignment of oyster planting grounds not authorized by the statute will not even serve to confer upon the assignee color of title, but is void, says: "Can the petitioners, in the face of this statute, so in evidence, come into this court and put the United States in their place, and ask just compensation for lands held, used and occupied by them unlawfully?"

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In *Silliman v. F. O. & Ch. R. R.*, 27 Gratt. 119, the following is quoted with approval: "In every instance (Mr. Justice Miller said in delivering the opinion in which a majority of the court concurred in the *Floyd Acceptances Case*, 7 Wall. U. S. R. 680, 19 L. Ed. 169), a person making a contract with the government, through its officers and agents, must look to the statutes under authority of which the agent as officer proposes to act, and see for himself that his contract comes within the terms of the law. The same rule would apply, *a fortiori*, to persons making contracts with the agents or officers of bodies corporate."

An oyster inspector is but an agent of the State to perform the duties delegated to him by statute, and all persons dealing with him must exercise care as to the extent of his authority and powers, and they are presumed to know the statutes under which he is called upon to act. This is but the general doctrine applying to all agencies, and the authorities are uniform that all acts of an agent outside of the scope of his authority are *ultra vires* and void. 1 Am. & Eng. Ency. L. p. 981, and note, p. 988, and note; *State v. Chilton*, 49 W. Va. 453, 39 S. E. 612; *N. Y. &c. Co. v. Harrison* (C. C.), 16 Fed. 688; Story's Agency (9 ed.), sec. 307a; Mechem's Pub. Off., 512; *Mayor, &c. v. Eschbach*, 18 Md. 276; *Delafield v. State*, 26 Wend. 192.

The powers and duties of all governmental officers are "limited and defined" by law, by statute where one exists as in this case, and the law is the sole criterion of authority; and no custom can enlarge or vitiate it. *The Floyd Acceptances Cases*, *supra*, 7 Wall. 666, 19 L. Ed. 169; *Davis v. Gordon*, 87 Va. 564, 13 S. E. 35.

In *Stainback v. Read & Co.*, 11 Gratt. 286, 62 Am. Dec. 648, the court said: "It is equally well settled that a party dealing with an agent acting under a written authority, must take notice of the extent and limits of that authority. He is to be regarded as dealing with the power before him; and he must at his peril observe that the act done by the agent is legally identical with the act authorized by the power."

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The principle applies as well where the agency is that of a public officer clothed with defined and limited powers and prescribed duties to be found in existing laws, as where the agency is created by writing signed by an individual firm or corporation. See also *Mayor of Baltimore, &c. v. Reynolds*, 20 Md. 1, 83 Am. Dec. 535.

We are of opinion that upon every branch of this case the decree complained of is erroneous and has to be reversed and annulled; and this court will enter the decree the circuit court should have entered, dissolving the injunction awarded appellee and perpetuated, and dismissing appellee's bill.

*Reversed.*

Statement.

**Mytherville.**

CORNELL AND COMPANY AND OTHERS v. STEELE.

June 10, 1909.

1. **CONTRACTS—Engineer's Estimates—Gross Errors—Fraud.**—Notwithstanding the fact that a contract provides that the decision of the chief engineer of one of the parties shall be final as between the parties as to all questions arising under the contract, the other party will not be precluded from recovering the correct amount due him for work done under the contract where the engineer's estimates or classifications are so grossly erroneous as to amount to a fraud upon the rights of the injured party. It is not necessary to allege or prove bad faith, or an intention to commit fraud on the part of the engineer. It is enough that his estimates or classifications are so grossly erroneous as to amount to fraud. This doctrine is not in conflict with the rule that fraud must be established by clear and satisfactory evidence.

Error to a judgment of the Circuit Court of Fluvanna county in an action of *assumpsit*. Judgment for the plaintiff. Defendants assign error.

*Affirmed.*

The opinion states the case.

*Perkins & Perkins* and *Moon & Fife*, for the plaintiffs in error.

*Harmon & Walsh* and *Montague & Montague*, for the defendant in error.

CARDWELL, J., delivered the opinion of the court.

This action was brought by W. I. Steele to recover of J. N. H. Cornell and Company, a foreign corporation, and J. H. Fine,

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a balance of \$7,511.05, alleged to be due Steele from the defendants upon certain work which Steele sub-contracted with Cornell and Company, general contractors with the Virginia Air Line Railway Company, to do on the Virginia Air Line Railway, to be constructed by the general contractor from Lindsay, on the C. & O. Railway in Albemarle county, to a point on James river, about twenty miles distant, the plaintiff, Steele, undertaking by his sub-contract the construction of four miles of this road within a stated period and according to specifications as to the execution of the work. That Steele performed his part of this contract truly and faithfully seems not to have been questioned, and the controversy arises out of the classification of the material taken out and removed by him, made by Cornell and Company's chief engineer in charge of the work.

The contract, which was in evidence at the trial of this cause, shows the price of the excavation of the several kinds of material, to be taken out and removed by Steele, viz., earth, loose rock and solid rock, gives the definition of these several classes of material, and provides for monthly payments as the work progressed and for a final estimate on the completion and acceptance of the work; and the contract also provides that the decision of the chief engineer of the general contractor on all questions arising under the contract shall be final as between the parties.

J. H. Fine, who made the estimates on Steele's work, was the chief engineer of the general contractor, and also its vice-president, and as Steele progressed with his work he received monthly payments upon the estimates made by Fine; but, as we shall see later, protested all along that these estimates were incorrect. On the completion of Steele's contract in January, 1908, Fine made a final estimate showing that the general contractor, Cornell and Company, owed Steele \$1,775.73, to which Steele objected, alleging that this estimate was based upon an erroneous classification of material excavated and removed, and thereupon Cornell and Company had the estimate reconsidered and

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the work re-examined, but insisted that the action of its chief engineer was correct and would not be corrected, and so informed Steele. Whereupon, Steele selected one James Dickey, a competent engineer and an expert, to go over the work and make an estimate of it according to the provisions of the contract, and Dickey's estimate varied materially from that of Fine, the chief difference arising from the classification of material, the difference in the total quantity of material moved, or yardage, caused by certain measurements adopted by Dickey and not allowed by Fine being comparatively slight. Omitting the items of these estimates as to which Dickey and Fine agreed, the latter's final estimate allowed Steele for 42,113.1 cubic yards of earth, \$9,896.58; 10,174.8 cubic yards of loose rock, \$3,856.42; and 586.9 cubic yards of solid rock, \$398.23; total, \$14,155.13; while in Dickey's estimate these several items appear as follows: 30,011.1 cubic yards of earth, \$7,052.60; 15,559.5 cubic yards of loose rock, \$5,912.61; and 10,017.8 cubic yards of solid rock, \$7,012.46; total, \$19,977.67. The disclosures made by these estimates caused Steele to realize that despite his rigid economy and efficient work, he would sustain a loss of over \$3,500 if Fine's estimate of his work was to be adhered to; and thereupon he brought this suit for \$7,511.05, the amount of the difference between the final estimate made by Fine and that made by Dickey.

At the trial of the cause, it was submitted to the jury upon four instructions given by the court, to which neither party made objection, and the jury rendered its verdict for the plaintiff, assessing his damages at \$3,600, and upon the verdict the court entered the judgment to which this writ of error was awarded.

The instructions of the trial court, in sum and substance, rightly told the jury that, notwithstanding the provision in the contract between the parties that the final estimate of the chief engineer of the general contractor, Cornell and Company, was to be final and conclusive on both parties, if they believed from the

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evidence Chief Engineer Fine made such error of judgment or mistake in the estimates and classification of the work made by him as amounted to a mistake so gross as necessarily to imply bad faith and amount to a fraud upon the rights of the plaintiff, they should find for the plaintiff, even though they believed that said engineer had no intention to commit a fraud or to act in bad faith; and further told the jury, that if they believed from the evidence that the estimates or classifications by the company's engineer were not binding on the plaintiff because of gross error or mistake, amounting to a fraud, then they should make such classification of the material removed as they deemed proper, under the evidence and according to the provisions, of the contract, and assess the plaintiff's damages according to that classification at the prices specified in the contract, subject to proper credits.

The contract between the parties is explicit as to the classification of the material that was to be removed and the prices to be paid therefor, solid rock being recognized as the most expensive material, and therefore a higher price for its removal was fixed than for the removal of earth or loose rock. It will, therefore, be seen that the subject of classification of the work done by defendant in error was the crucial point in the case, for the determination of the jury, and we deem it only necessary to refer briefly to the evidence to show that it was sufficient to warrant the jury in regarding the estimate made by Fine so grossly erroneous as to amount to a fraud upon the rights of defendant in error.

The material classified as solid rock by defendant in error and Dickey, and disallowed by Fine, is clearly and unmistakably proven to be the same material, of the same nature and character of rock as that allowed defendant in error and classified by Fine as solid rock to the extent of 569 cubic yards. In other words, the evidence shows that the rock, classified as solid rock by defendant in error and by Dickey, was of the identical kind, character and formation as the 569 yards of solid rock

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allowed by the estimates made by Fine, and that the arbitrary rejection by him of over 9,000 cubic yards of this solid rock removed by defendant in error, and classifying the same with other material far less expensive to remove, was an error of judgment or mistake so gross as to amount to a fraud upon defendant in error's rights; and if the jury believed in the truth and correctness of this evidence, it was of itself sufficient to sustain its finding in his favor. *Mills & Fairfax v. N. & W. Ry. Co.*, 90 Va. 523, 19 S. E. 171; *Id.* 91 Va. 613, 22 S. E. 556.

In the report of that case last mentioned, the syllabus in part is as follows: "Whether the plaintiff was entitled to recover the higher or the lower of the two prices fixed by the contract for different classes of work, or whether he had waived or abandoned his right to recover the higher price, were questions of fact which were properly left to the determination of the jury, under instructions which correctly propounded the law, and gave them great latitude in the range of their inquiry."

The defendant in error in this case, testifying in his own behalf, stated that he all along protested that the classification of the material removed by him, made by Chief Engineer Fine in his monthly estimates, was grossly erroneous, and this statement is not disproved; but plaintiffs in error rely upon the contention, in support of which numerous authorities are cited, that fraud must be established by clear and satisfactory proof. The authorities cited sustain the proposition stated, but are not at all in conflict with the law as expounded in the instructions given in this case with the approval of plaintiffs in error, nor with the decided cases applicable to the facts submitted to the jury for determination.

In *Mills & Fairfax v. N. & W. Ry. Co. supra*, it was expressly stated that to avoid the engineer's estimate and classification in a case like this, which is so grossly erroneous as to imply fraud, it is not necessary to impute or prove moral wrong to the engineer. All that is necessary in such a case is that the evidence be sufficient to justify the jury in finding that the



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estimates and classifications of the engineer are so grossly erroneous as to amount to a fraud upon the rights of the injured party.

In the case of *Kistler v. Ind. & St. L. R. Co.*, 88 Ind. 460, the contract between a railroad company and one who undertook to do certain work in its construction fixed the prices of the various kinds of work to be done, and provided that the engineer of the road should make estimates of the work from time to time upon which payment should be made and a final estimate which should be also paid, and that all disputes as to the meaning and execution of the contract should be referred to the engineer, and his decision should be final: *Held*, that where the engineer had failed to estimate the work, or by neglect, or by mistake, underestimated it, suit could be maintained for the recovery of the correct amount. In that case the court emphasizes that to entitle the contractor to recover the correct amount due him for work done, it was not necessary to allege and prove that the engineer making the estimates acted corruptly or fraudulently.

In a later case decided by the same court, *Louisville, &c. Ry. Co. v. Donnegan*, 111 Ind. 179, 12 N. E. 153, it was held: "A stipulation in a contract between a railroad company and a contractor, that the estimate made by the former's engineer as to the quality, character and the value of the work performed by the contractor shall be final against the latter, 'without further recourse or appeal,' cannot deprive him of the right to resort to the courts for the recovery of what may be due him, notwithstanding the estimates."

In that case it was considered that the estimates of the engineers were so grossly erroneous as to amount to a fraud upon the contractor, although moral turpitude was neither charged nor attempted to be proved; in other words, where the mistake is so gross as to amount to a fraud upon the rights of the contractor, he is not precluded from bringing his action to recover the correct amount due him, notwithstanding the provisions of

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the contract or the fact that he had received and receipted for payments on estimates made during the progress of the work and before the final estimate. See also *Edwards v. Hartshorn*, 72 Kan. 19, 82 Pac. 520, 1 L. R. A. (N. S.), p. 1055, where almost the precise facts were involved as in this case.

We are of opinion that there is no error in the judgment of the circuit court complained of, and it is, therefore, affirmed.

*Affirmed.*

Statement.

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**Mythreville.**

FARMERS MANUFACTURING CO. v. WOODWORTH.

June 10, 1909.

1. EVIDENCE—*Parol Evidence—Incomplete Writing.*—While parol evidence of prior or contemporaneous agreements will not be received to vary, alter or contradict the terms of a valid written contract, complete on its face, this rule of exclusion has no application where it is apparent from the writing itself that it does not embody the entire agreement. In such case, the writing being incomplete, it must be supplemented by other evidence, not to contradict or vary its terms, but to establish the real contract between the parties.
2. EVIDENCE—*False Representations—Parol Evidence.*—Parol evidence is admissible to prove that one party was induced to enter into a contract by the false representations of the other. Such evidence is equally admissible, whether the contract was written or verbal.
3. WITNESSES—*Death of a Party to Contract—Agent or Survivor.*—The agent of a corporation contracting for his principal is not rendered incompetent to testify by reason of the death of the other contracting party.

Error to a judgment of the Circuit Court of the city of Norfolk in an action of *assumpsit*. Judgment for the defendant. Plaintiff assigns error.

*Reversed.*

The opinion states the case.

*Jeffries, Wolcott & Wolcott* and *V. H. Kellam*, for the plaintiff in error.

*Brooke & Brooke*, for the defendant in error.

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WHITTLE, J., delivered the opinion of the court.

The plaintiff in error, the Farmers Manufacturing Company, applied to the late firm of T. W. Godwin & Co., of which the defendant in error, A. L. Woodworth, is the surviving partner, to manufacture for it an amusement device called a "Revolving Parachute," the general design of which is described as follows: "A circular platform was to be elevated by means of a revolving upright screw, or shaft, driven by electric power applied to machinery at its base. As this shaft revolved the platform was forced upward, and when it reached the top of the shaft was stopped, and the platform released and left free to descend by gravitation, revolving around the shaft."

Numerous interviews were had between the parties touching the construction of this contrivance, which culminated in the following correspondence:

"Norfolk, Va., July 3, 1906.

"J. Frank East, Esq.,

"Norfolk, Virginia.

"Dear Sir:

"We beg to advise you that we will build the steel structure, with sixty feet of screw as per plans submitted and erect the same on the foundation prepared by you, \* \* \* for the sum of five thousand (\$5,000) dollars. It is further understood that you are to transport all the material, taking the same from our works and delivering the same at the point and alongside the foundation where the structure is to be erected \* \* \* and free of cost to the builders. That the structure shall be ready for delivery at our works by the 15th of September, 1906. The brake and air cushion shall be efficient for the purpose intended. The tower roof shall be of galvanized metal and oval in form. The two approaches for reaching the floor of the observation tower shall be inclosed. All black iron work to be covered with two coats of mineral paint. The structure and

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mechanism to be built on the lines of the illustrated model submitted.

“Respectfully submitted,  
“T. W. GODWIN & COMPANY.”

“Norfolk, Va., July 10, 1906.

“Virginia Iron Works (T. W. Godwin & Company),  
“Norfolk, Virginia.

“Dear Sir:

“We are in receipt of your favor of the 3rd, reference to building the steel structure and accept proposition, and ask that work proceed with all possible dispatch.

“Yours respectfully,  
“FARMERS MFG. CO.,  
“By J. FRANK EAST.”

When completed, the structure was erected on the grounds of the Jamestown Exposition Company; but it proved unsatisfactory, and was condemned by the mechanical expert of that company, whose duty it was to inspect and pass on all structures set up on the grounds. It was pronounced unsafe and dangerous to human life, and its operation within the grounds forbidden.

Thereupon, this action of *assumpsit* was brought by the plaintiff in error against Woodward, surviving partner of himself and T. W. Godwin, deceased, to recover damages for their alleged breach of contract in connection with the construction of the machine. To a judgment on behalf of the defendant this writ of error was allowed.

There are three counts in the declaration, which may be thus summarized:

1. That the plaintiff was ignorant of the nature and mechanism of the machine and how it ought to be built so as to operate properly, and whether it could be used with safety to human

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life and so constructed that the platform would ascend and descend in ten minutes (that being the speed agreed on in order to make it a financial success). That T. W. Godwin & Co. were mechanical experts and skilled in such matters, and the plaintiff submitted the model to them and explained the purposes for which the device was intended, telling them that it must be so constructed as to be capable of being operated with safety and within the time limit prescribed; and that unless assured that these essentials could be attained, the plaintiff did not desire the machine to be made. That the manufacturers submitted a plan of the device, and assured the plaintiff that if built according to that plan it would meet the specified requirements; and promised and warranted that if they were awarded the contract of construction, the machine would be safe and suitable for the purpose mentioned. That the plaintiff, relying upon these warranties, and in consideration thereof, gave the contract to T. W. Godwin & Co. That the warranties were broken in the particulars set forth in the declaration, and the machine was wholly worthless for the purposes intended.

2. The second count is founded upon the false representations of T. W. Godwin & Co. as to a fact within their knowledge as experts, that the machine, if constructed by them according to the plans submitted, could be operated without danger to human life and at the required speed, and would be suitable for the uses contemplated. That relying upon these representations, the plaintiff entered into the contract; and that the representations were false, and the machine worthless.

3. The third count alleges the breach of an implied warranty on the part of the manufacturers, that the machine contracted for would be reasonably suitable for the purposes intended, which purposes were known to them, and also the fact that the plaintiff relied on their judgment and skill in the construction of the device.

The plaintiff set out circumstantially what it expected to

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prove under the several counts of the declaration; but, upon objection, the court excluded the evidence, being of opinion that the correspondence contained in the letters of July 3 and 10, 1906, constituted a complete written contract between the parties, the terms of which it was not permissible to vary or add to by parol evidence. The trial proceeded upon that theory, and naturally resulted in a verdict for the defendant.

The legal proposition is not controverted, that a contract in writing, complete on its face, cannot be altered or contravened by parol evidence of inconsistent agreements and undertakings previously or contemporaneously made. *Towner v. Lucas*, 13 Gratt. 705; *Virginia Hot Springs Co. v. Harrison*, 93 Va. 569, 25 S. E. 888; *Slaughter v. Smither*, 97 Va. 202, 33 S. E. 544; *Carlin v. Fraser*, 105 Va. 216, 53 S. E. 145.

The rule is thus stated in *Slaughter v. Smither*, *supra*: "If the written contract purports to contain the whole agreement, and it is not apparent from the writing itself that something is left out to be supplied, parol evidence to vary or add to its terms is not admissible."

In the instant case, however, it is obvious from the letters themselves, read in connection with the plans to which they refer, that there were necessarily other provisions of the contract which do not appear on the face of the writings. The letter of July 3, 1906, which composes the body of the alleged written agreement, is of the most general character and bears internal evidence of the fact that to be intelligible it must be read in the light of outside matters in the minds of the parties. The agreement to build "the steel structure" dissociated from previous negotiation as to the particular structure contemplated by the parties and to which it manifestly refers contains no intimation of what was really in the minds of the contracting parties. "Structure" is a term of general signification, and in the absence of explanatory words conveys no definite idea of what is intended.

Nor is the situation materially aided by inspection of the

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plans referred to in the letter. They are drawn to no scale and contain no specifications, but are blue-prints presenting merely in general outline tracings of the proposed device.

In fine, it would not be possible for one possessed of no information other than that supplied by the alleged written agreement to form an intelligent idea of the contemplated structure.

The rule of exclusion of parol evidence has no application where it is apparent from the writing itself that it does not embody the entire agreement. In such case, the writing being incomplete, it must be supplemented by other evidence, not to contradict or vary its terms, but to establish the real contract between the parties.

Besides, parol evidence was admissible under the second count of the declaration to prove the alleged false representations made by T. W. Godwin & Co. to induce the plaintiff to enter into the contract. Such evidence would be equally admissible, whether the contract were written or verbal. *Grim v. Byrd*, 32 Gratt. 293, 300; *Rorer Iron Co. v. Trent*, 83 Va. 397, 2 S. E. 713, 5 Am. St. Rep. 285; *Herron v. Dibrell*, 87 Va. 289, 296, 12 S. E. 674; *Wilson v. Carpenter*, 91 Va. 183, 21 S. E. 243 50 Am. St. Rep. 824; *Grosh v. Ivanhoe, &c. Co.*, 95 Va. 161, 27 S. E. 841; *Wren v. Moncure*, 95 Va. 369, 28 S. E. 588; *Guarantee Co. v. National Bank*, 95 Va. 480, 491, 28 S. E. 909.

It follows from the foregoing views that the case must be tried *de novo* along essentially different lines; and that fact renders it unnecessary to notice subordinate assignments of error upon questions which may not arise at the next trial.

So, also, with respect to the allegations of the third count of the declaration. If a proper case shall arise for the application of the doctrine of implied warranty of fitness of the machine for the purposes for which it was intended, the jury can be instructed upon that aspect of the case.

The defendant in error assigns as cross-error the action of the court in admitting the testimony of the witness, East. It



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is insisted that Godwin being dead, East was rendered incompetent to testify by the terms of the statute.

East was the agent of the plaintiff, and this court held in the case of *Mutual Life Insurance Co. v. Oliver*, 95 Va. 445, 28 S. E. 594, that the agent of a corporation contracting for his principal is not rendered incompetent to testify by reason of the death of the other contracting party.

For these reasons the judgment of the circuit court must be reversed, the verdict of the jury set aside, and the case remanded for a new trial to be had not in conflict with the views expressed in this opinion.

*Reversed.*

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Syllabus.

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**Mytherville.**

FITZGERALD AND OTHERS V. FRANKEL AND OTHERS.

June 10, 1909.

**1. FRAUD—Evidence from the Transaction Itself—Case in Judgment.—**

While it is true that fraud is not to be assumed on doubtful evidence or circumstances of mere suspicion, but must be alleged and clearly proved, yet a transaction may of itself and by itself furnish the most satisfactory proof of fraud, so conclusive as to outweigh the answer of defendants, or even the evidence of witnesses. The circumstances attending and following a transaction are often of such character as to leave no room to doubt the real object and motive of the parties engaged in it. The facts established in the case in judgment justify the conclusion that the appellants have been defrauded of their property by preparation for the wrong, concealment of the truth, and false statements as to material facts by the other party to the transaction.

**2. FRAUDULENT REPRESENTATION—Reliance on—Evidence of Non-Reliance.—**

If the purchaser of property has not equal means of information with the seller, and he has the right to rely upon representations made by the seller with reference to the property, evidence to show that he did not rely upon such representations must be of the clearest and most satisfactory character. In such cases there ought to be no room for inference or mere implication.

**3. CONTRACTS—Obtained by Fraud—Affirmation—Proof Required—**

**Waiver.**—Affirmation of a contract voidable for fraud must be a solemn and deliberate act. When the original transaction is infected with fraud the confirmation of it is so inconsistent with justice, and so likely to be accompanied with imposition, that the courts watch it with the utmost strictness, and do not allow it to stand but on the clearest evidence. No man can be bound by a waiver of his rights unless such waiver is distinctly made with full knowledge of the rights which he intends to waive, and the fact that he knows his rights and intends to waive them must plainly appear.

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Appeal from a decree of the Circuit Court of Pittsylvania county. Decree for defendants. Complainants appeal.

*Reversed.*

The opinion states the case.

*Samuel A. Anderson* and *Phlegar & Powell*, for the appellants.

*Peatross & Harris, Wm. Leigh* and *Hill Carter*, for the appellees.

HARRISON, J., delivered the opinion of the court.

The bill exhibited in this case by the appellants, W. R. Fitzgerald and his wife, Sallie J. Fitzgerald, sets out that they were joint owners of certain valuable real and personal property in the county of Pittsylvania, and that they had been induced by fraud and misrepresentation to convey the same to one Maurice Franklin in exchange for certain real estate in the city of Chicago. The prayer of the bill is that the contract entered into between the parties and the deed carrying out the contract, dated November 20, 1905, be set aside, vacated and rescinded; and that their property be restored to them, and the defendant required to refund the sums paid to him by them under the terms of the contract.

The relief asked for by the appellants rests upon two grounds: 1st. Fraud and misrepresentation in the procurement of the exchange of properties; and, 2nd. The mental incapacity of the appellant, W. R. Fitzgerald, to contract.

In the view that we take of the case, it is only necessary to consider the first of these grounds.

It is true, as contended on behalf of the appellees, that fraud

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is not to be assumed on doubtful evidence or circumstances of mere suspicion, but must be alleged and clearly proven. It is, however, equally well established, that "a transaction may of itself and by itself furnish the most satisfactory proof of fraud, so conclusive as to outweigh the answer of defendants, or even the evidence of witnesses. The circumstances attending and following a transaction are often of such character as to leave not even a shadow of a doubt as to the real object and motive of the parties engaged in it. \* \* \* Experience attests that in a majority of cases fraud can only be established by circumstances. The motives and intentions of the parties can only be judged of by their actions, and the nature and character of the transaction in which they are engaged. They often furnish more conclusive evidence than the most direct testimony." *Hazlewood v. Forrer*, 94 Va. 703, 706-7, 27 S. E. 507.

In the present case, the record shows that the appellants owned in Pittsylvania county a very valuable farm, known as their "Home Place," containing about six hundred acres; another less valuable tract, containing about one hundred and fifty acres; five pieces of improved property in the town of Chatham, used as storehouses and offices; a considerable quantity of personal property consisting of farming implements, stock, crops, etc., and a solvent investment of \$5,000 secured by mortgage. The appellant, W. R. Fitzgerald, was advancing in life and growing feeble in health, and for this reason he desired to sell his "Home Place" with a view to investing the proceeds in a way to secure him an income without the care and labor incident to farm life. With this in view he began a correspondence with one C. M. Williams, a Chicago real estate broker. Williams came to Virginia, and, finding that the appellants owned considerable property other than the "Home Place," he suggested an exchange, through another agent, for the "Willard Apartments" in Chicago, a twenty-one flat building, valued at \$100,000, with a mortgage upon it for \$50,000.

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He had with him a picture and printed description of the property, and expressed the belief that he might be able to exchange the equity of redemption in this property for all of the property the appellants owned, except a small portion of the personalty. He offered to ascertain if the agent in Chicago would entertain a deal, and if so, to wire the appellant, W. R. Fitzgerald, to meet him in Charlottesville and go to Chicago. The so-called Chicago agent was willing to negotiate. Williams, however, did not meet Fitzgerald at Charlottesville, as agreed upon, but went to Chicago a day in advance and met him at the station there; showed him the property, and introduced him to one H. W. Duncanson as the agent for the owner of the property, and introduced the person who was personating Maurice Franklin as "Mandel Frankel."

Agent Duncanson, after taking a list of the properties owned by the appellants, told Fitzgerald that he would talk it over with "his people" and let him know. He said that the property was being held at \$100,000, but he thought he could get the deal through. At two o'clock he told Fitzgerald that he had not yet been able to see "my people," and to return at five o'clock when things might be in shape to talk definitely. When Fitzgerald returned at five o'clock, he found Duncanson with a contract already prepared consummating the exchange of properties, which was signed by Fitzgerald without comment. By the terms of this contract Fitzgerald was to transfer to Maurice Franklin all of his real estate in Virginia, and practically all of his personal property, including the \$5,000 mortgage, and the so-called agent of Franklin was to have six days in which to examine the Fitzgerald property and affirm or cancel the contract.

Within the prescribed time, H. W. Duncanson, with one J. B. Smiley, came to Virginia. After examining the property, they expressed dissatisfaction with the Chicago contract; prepared another contract, which included all of the personal property owned by the appellants, some of which was not em-

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braced in the Chicago contract, and further provided that the appellants should in addition give their note for \$1,500. This contract was signed by J. B. Smiley and the appellants, W. R. Fitzgerald signing his wife's name. On this occasion the Chicago property was again represented to be worth \$100,000, to have cost \$75,000, and to be rented for \$9,000. The appellants were also given, at the time, pictures and descriptions of the property which stated that the property was renting for about \$9,000. Duncanson and Smiley also represented themselves as agents for Maurice Franklin, the owner of the property, describing him as a wealthy man in bad health who was at that time in California. Shortly after this agreement was made, deeds of exchange were executed by Maurice Franklin and the appellants. After this suit was brought in April, 1906, and a "*lis pendens*" had been docketed, a deed was executed by Maurice Franklin conveying the Virginia property to J. B. Smiley.

It is fortunately rare that a record presents such a scheme of fraud and deceit as appears to have characterized these transactions from their inception to their conclusion. It is established that there was no such person as Maurice Franklin, who was represented by Duncanson as the wealthy owner of the Chicago property. This so-called Maurice Franklin turns out to have been Mandel Frankel, a young clerk in Duncanson's office, who is shown to have been a tool of Duncanson, ready and willing to sign any paper by any name that his employer might dictate. He files an answer in this cause, admitting his relations with Duncanson, disclosing Duncanson as the real owner of the Chicago property, admitting much of the fraud and deceit that had characterized Duncanson's conduct in the matter, and expressing the belief that unless the transaction was annulled and set aside the appellants would lose their entire property.

J. B. Smiley appears as another tool of Duncanson, actively uniting with him in suppressing the real facts and making a

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false impression. He files a petition in the cause and an answer to the amended bill, asserting himself to be the owner in fee simple of the Pittsylvania property. In the further progress of the case he admits that Duncanson was the real owner, and asks for an order, which was entered, striking out of his answer so much thereof as sets up an equitable claim in himself to the land in controversy.

H. W. Duncanson, the real owner of the Chicago property, is shown to be concealing his property from his creditors, using for this purpose a fictitious person or a false name, declaring his existence as a real person, describing him as a wealthy man in bad health and a traveler, representing himself as the agent of this myth, and denying any interest in the property or claiming it all, as he thinks the exigency of the occasion requires.

The Chicago property was purchased by Duncanson in January, 1905, when unimproved, and the conveyance made to his clerk under the false name of Maurice Franklin. Instead of costing, with the improvements put upon it, \$75,000, as represented to appellants, it is shown to have cost about \$38,000. Instead of renting for \$9,000 *per annum*, as represented to appellants, it is shown to have been renting for little more than enough to pay the expenses including the interest on the \$50,000 mortgage upon it. It is shown that the written lease contracts taken by Duncanson from the tenants occupying the building called for a much larger rental than was actually paid, and that this was done to enhance the sale value of the building and to keep up the rental value with other would-be tenants. Duncanson claims that this was a custom in Chicago. It is avowedly a fraudulent purpose, intended to entrap the first unwary victim, and behind such a custom, if it exists, one cannot shield himself in a court of conscience.

About the time this suit was brought, or soon thereafter, a suit was filed in Cook county, Illinois, for the purpose of foreclosing the mortgages on the Chicago property involved in this

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litigation. The weight of the evidence shows that, instead of the property being worth \$100,000, as represented to appellants, it is hardly worth more than enough to pay the mortgages resting upon it.

It is insisted that these representations as to the fee simple and rental value of the Chicago property were only expressions of opinion, and sellers' commendation. This is not tenable. The evidence as a whole leaves no room to doubt that the representations as to value were intended to mislead.

In *Grim v. Byrd*, 32 Gratt. 293, 301, where the principles controlling this case are fully and clearly stated, by Judge Staples, it is said: "Even a matter of opinion may amount to an affirmation, and be an inducement to a contract, especially where the parties are not dealing upon equal terms, and one of them has, or is presumed to have, means of information not equally open to the other."

If the purchaser has not equal means of information with the seller (which is the case at bar), if it be a case in which he had the right to rely upon the representation, the evidence to show that he did not rely upon it must be of the clearest and most satisfactory character. In such cases, there ought to be no room for inference or mere implication. *Grim v. Byrd*, *supra*.

So far from the appellants not having relied on the representations in question, it appears that the only source of information they had was through those who made the representations, and that reliance upon those representations caused them to make the contract.

The appellant, W. R. Fitzgerald, after this suit was brought, received from H. W. Duncanson \$137.95 on account of rent derived from the Chicago property, which it is claimed was an affirmation of the original transaction. The evidence shows that after the appellant realized that he was about to lose his entire estate as the result of this transaction, he grew rapidly worse in mind and body, and became mentally irresponsible.



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Before this \$137.95 was sent, Duncanson had been told that Fitzgerald was insane. It cannot be said, under such circumstances, that Duncanson was misled by the acceptance of this rent, or that Fitzgerald intended by its acceptance to affirm a transaction in which he and his wife were jointly interested, and for a rescission of which they then had a suit pending.

Affirmation must be a solemn and deliberate act. When the original transaction is infected with fraud, the confirmation of it is so inconsistent with justice and so likely to be accompanied with imposition, that the courts watch it with the utmost strictness and do not allow it to stand but on the clearest evidence. No man can be bound by a waiver of his rights unless such waiver is distinctly made with full knowledge of the rights which he intends to waive, and the fact that he knows his rights and intends to waive them must plainly appear. *Wilson v. Carpenter*, 91 Va. 183, 21 S. E. 243, 50 Am. St. Rep. 824.

Without prolonging this opinion with further details, it is sufficient to say that the facts established by the voluminous record before us justify the conclusion that the appellants have been, by preparation for the wrong, concealment of the truth, and false statements as to material facts, defrauded of their property; and that they are entitled, at the hands of a court of equity, to relief from the imposition practiced upon them.

The decree appealed from must, therefore, be reversed, and the cause remanded for a decree to be entered by the circuit court, rescinding the contract between the parties whereby the exchange of properties mentioned in this cause was agreed to, and vacating and cancelling the deed of November 20, 1905, carrying out such contract; and further requiring Maurice Franklin to reconvey to the appellants all of the property, real and personal, in Pittsylvania county which passed under the deed from them of November 20, 1905; and in default of such reconveyance being made to have said property reconveyed to the appellants by a commissioner appointed for that purpose; and further requiring the appellants to reconvey the Chicago

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property to Maurice Franklin, when the amount paid by the appellants on account of the exchange of properties, whether by bond, note or money, and the costs which are herein decreed to the appellants and such costs as may be decreed to them by the circuit court, have been refunded and paid to them.

*Reversed.*

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**Mytherville.****HUNDLEY AND OTHERS v. NEALE, OYSTER INSPECTOR.**

June 10, 1909.

1. OYSTERS—*Application for Grounds—Priority of Claims.*—The writ of mandamus prayed for in the case at bar, to compel the oyster inspector to take the necessary preliminary steps to assign certain oyster grounds to the petitioner, was properly refused, as there were pending before the inspector prior *bona fide* applications for the same grounds which had not been acted on through no fault of the applicants. The prior applications were before the re-establishment of the lines of the Baylor survey, but were still insisted on, while petitioner's application was not filed till after such re-establishment.

Error to a judgment of the Circuit Court of Essex county on a petition for a mandamus. Judgment for the defendant. Plaintiffs assign error.

*Affirmed.*

The opinion states the case.

*Thomas E. Blakey* and *Jos. W. Chinn, Jr.*, for the plaintiffs in error.

*James N. Stubbs, H. I. Lewis, F. G. Newbill* and *Jno. R. Saunders*, for the defendant in error.

HARRISON, J., delivered the opinion of the court.

This is an application by the plaintiffs in error to the Circuit Court of Essex county for a writ of mandamus to compel the

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defendant in error to post notices of their application for certain oyster planting grounds, in conformity with the statute, for the purpose of establishing the right of the petitioners to an assignment of such ground.

A jury was waived, and the whole question of law and fact was submitted to the court. The sole issue of fact, agreed upon by the parties, to be determined by the court, as shown by the order of submission, was as follows: "Did the petitioners make application according to law to R. G. Neale, oyster inspector for Essex county, Va., district No. 9, for the oyster bottom described in the petition, and, if so; were the said petitioners the first *bona fide* applicants for said bottom."

Upon the evidence, the circuit court held that the petitioners had made application according to law for the oyster bottom described in their petition, but that they were not the first *bona fide* applicants for such oyster bottom, the same having been previously applied for, according to law, by Walter C. Palmer and Garrett & Hunt, respectively, as set out in the answer of R. G. Neale, inspector. Thereupon, the writ of mandamus was denied and the petition dismissed.

The record before us abundantly sustains this action of the circuit court. It appears that on January 3, 1903, Walter C. Palmer filed with the oyster inspector his application for the oyster bottom in controversy. It further appears that Palmer frequently, after filing his written application, applied verbally to the inspector, asking that the ground in question should be assigned to him, and was told by the inspector that his application was on file and was the first to be filed, but that the oyster ground covered by the application was within the Baylor survey, and not, therefore, such public bottoms as it was proper for him to rent out.

It further appears that on February 7, 1903, Garrett & Hunt filed their application for a portion of the ground in dispute, and were informed of Palmer's application and the difficulty in the way of the inspector's acting. And on August

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5, 1907, the petitioners filed their application for the oyster bottom in question.

It is satisfactorily shown that from 1903, when the early applications were made for these grounds, up to 1907, when the petitioners made their application, it was not known whether these oyster grounds were within or without the Baylor survey. If they were within the Baylor survey the inspector had no authority to post notices with respect to them. The matter was in such confusion that nothing could be done until there was a survey re-establishing the line of the Baylor survey. This survey was ordered and a report made in August, 1907, to the Board of Fisheries by the surveyor, showing that the grounds were without the Baylor survey. After the result of this survey was known, the petitioners, for the first time, filed their application for the oyster grounds in question; and before the report of the surveyor had been confirmed by the Board of Fisheries, they presented their petition for this writ of mandamus to compel the oyster inspector to post notices of their application for the purpose of establishing their right to an assignment of the oyster bottoms in controversy.

The *bona fide* applications of Walter C. Palmer and Garrett & Hunt, respectively, were made and filed long before that of the petitioners was made, and the delay in securing action upon such applications was due to no fault of theirs, and did not prejudice their rights.

Upon the issue submitted to its determination, the circuit court could not have held otherwise, and its judgment must be affirmed.

*Affirmed.*

## Statement.

**Mytherville.**

HUNTER AND OTHERS V. HICKS AND OTHERS.

June 10, 1909.

1. *DEEDS—Fee Simple—Limitation Over of What Remains.*—Under a deed which conveys land to a trustee for the benefit of a married woman, with power to her to sell and dispose of the property and make such disposition of the proceeds of sale as she may think proper, the married woman takes an equitable fee simple estate in the property and a limitation over to another of any interest in "the property then remaining," is void for uncertainty and repugnancy.

Error to a judgment of the Circuit Court of the city of Norfolk in an action of ejectment. Judgment for the defendants. Plaintiffs assign error.

*Reversed.*

The declaration was as follows:

"Robert I. Hunter, Newtie E. Hunter and Louise E. Shanks complain of W. H. Hicks and the Calvert Mortgage and Deposit Company of Baltimore City, of a plea of trespass, for this, to-wit, that on the 2nd day of March, in the year 1871, one Isaac R. Hunter was seized and possessed of that certain tract, piece or parcel of land lying and being in the county of Norfolk, near the city of Norfolk, at the town of Huntersville, which was the place and residence where the said Isaac R. Hunter then resided, and bounded on the north by the lots formerly owned by Reynolds and Hinton, on the south by other land of the said Isaac R. Hunter and Mrs. Barnes' land and others, on the east by other land of the said Isaac R. Hunter, and on

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the west by Lambert's Point Road, containing by estimation five acres, and also of another tract of land, adjoining that above described, containing about 40 acres, also in the said town of Huntersville, and, being so seized and possessed of said two tracts of land, the said Isaac R. Hunter executed and delivered to one V. O. Cassell, trustee, a certain deed, in the following words and figures, to-wit:

"This deed made this 2nd day of March, Anno Domini, one thousand eight hundred and seventy-one, between Isaac R. Hunter, of the first part, V. O. Cassell, trustee, of the second part, and Martha Louisa Hunter, wife of the said Isaac R. Hunter, of the third part.

"Witnesseth, that in consideration of the love and affection which the said Isaac R. Hunter hath and beareth for his wife, the said Martha Louisa Hunter, and for and in consideration of the sum of five dollars, to the said Isaac R. Hunter in hand paid by the said V. O. Cassell, trustee, the receipt whereof is hereby acknowledged, he, the said I. R. Hunter doth grant unto the said V. O. Cassell, trustee, the following property with general warranty with its appurtenances, to-wit, viz., that certain tract, piece or parcel of land lying and being in the county of Norfolk, near the city of Norfolk, at the town of Huntersville, and is the place and residence where the said I. R. Hunter now resides and bounded as follows: on the north by the lots formerly owned by Reynolds & Hinton, on the south by said Hunter's land and Mrs. Barnes' land and others, on the east by Hunter's land, and on the west by Lambert's Point Road, containing by estimation five acres. Also the balance of the land owned by the said Isaac R. Hunter in the town of Huntersville, consisting of about forty acres and adjoining the land hereinbefore described. Also the stock on the said lands, consisting of four horses, and ten hogs. Also the following personal property, one rockaway, one cart and gear, farming utensils, household and kitchen furniture, consisting of six beds, five bed-steads, three dozen chairs, four tables, one piano,

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four looking glasses, and a pot of crockery, three stoves, one side board, one bond for twenty-five hundred dollars, dated August 31, 1869, payable in installments of one and two years, executed to said I. R. Hunter by H. J. Reynolds and I. W. Hinton. Also a note for four hundred and fifty dollars, executed by Wm. Taylor to said Isaac R. Hunter, dated the 25th day of January, 1871, payable two years after date. Also a note for four hundred and fifty dollars, executed by Wm. Taylor to said I. R. Hunter, dated 26th day of January, 1871, payable three years after the date thereof. To have and to hold the said property hereinbefore described unto the said trustee upon trust, that he the said trustee shall permit the said Martha Louisa Hunter, to occupy, possess and enjoy the said property, and the rents, issues and profits thereof, to take for and during the term of her natural life, for her support and family free and clear of and from all manner of charge and incumbrance of her said husband; it being the express intent and meaning of these presents that the said property is conveyed to the said trustee to hold exclusively and absolutely for the benefit of said Martha Louisa Hunter as though she was a *femme sole*, free and clear entirely of and from any marital rights whatever of her said husband, except as hereinafter provided for. But if at any future time it shall by the said Martha Louisa Hunter be thought proper for her interest to sell the said property in whole or in part for her benefit, then and in that event it is agreed on the part of said grantor and trustee and the third party hereto that the said Martha Louisa Hunter shall have full power to sell and dispose of the property hereinbefore described and to execute proper deed or deeds of conveyance for the same, through and by said trustee, or other writing, transfer or delivery at any time in the same manner and make such disposition of the proceeds of the sale as she may think proper, and also through said trustee to collect the said notes, and deliver them to the makers or other proper person and dispose of their proceeds always, however, and in all cases with the co-



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operation and assent of the said V. O. Cassell, trustee, who, on his part agrees to execute such instruments as may be needful in the premises as the said Martha Louisa Hunter may direct by her becoming a party to and signing said instrument. And the said Martha Louisa Hunter may also if she think proper with the proceeds as aforesaid purchase other property, real or personal, through and by her said trustee, and the deed made to said trustee for her sole benefit, and to be held upon the same terms as the other property herein mentioned. If the said Martha Louisa Hunter should depart this life, leaving her said husband the grantor in this deed surviving, then this grant as to the property then remaining is to cease and determine, but she shall have power and full authority is hereby given her by instrument in the nature of a last will and testament to dispose of one-half of the property hereinbefore described or hereafter acquired as aforesaid, then remaining but if the said Isaac R. Hunter should die first, then and in that event he hereby expressly reserves to himself full power and authority to dispose of the other half of the property then remaining hereinbefore described or hereafter acquired by his last will and testament in such manner and to such persons as he shall or may think proper, by his said will. And it is further agreed between the parties aforesaid that V. O. Cassell, the trustee as aforesaid, shall be responsible and liable only for such money or property as may come into his possession under the deed and not otherwise; and in the same manner as above stated incumbrances may be created upon the said property such as are consistent with the true intent and purposes of this deed; that is to say money may be borrowed and deed of trust executed as aforesaid given to secure the same upon the land hereinbefore described. The said trustee is to have and receive two and one-half *per cent.* upon the matters of this trust.

“There is a deed of trust now standing to H. M. Bowden, trustee, to secure Rebecca B. Tunis the payment of a bond for \$2.100, executed by said I. R. Hunter. Now it is the intention

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of the grantor in this deed to liquidate the debt secured in said deed, and this deed is made subject to said deed.

“Witness the following signatures and seals.

“I. R. HUNTER, (Seal)

“MARTHA L. HUNTER, (Seal)

“V. O. CASSELL, Trustee. (Seal)’

“By which said deed the said Martha Louisa Hunter, the wife of the said Isaac R. Hunter, acquired title to the property mentioned in said deed in fee simple, and subsequently the said Martha Louisa Hunter departed this life intestate, leaving surviving her as her only heirs at law her four children, Emily L. Hunter, Armie N. Hunter, and the said Robert I. Hunter and Newtie E. Hunter, whereupon the said land descended to the said Emily L. Hunter, Armie N. Hunter, Robert I. Hunter, and Newtie E. Hunter, in fee simple, an undivided one-fourth interest to each. The said Emily L. Hunter, who subsequently intermarried with and survived one Joseph R. Spratley, by her last will and testament, duly admitted to probate, devised her undivided one-fourth interest in said land to the said Newtie E. Hunter, and the said Armie N. Hunter, who subsequently intermarried with one Joseph D. Gaskins, afterwards departed this life intestate, whereupon her undivided one-fourth interest in said land descended to her only child and heir at law, to-wit, the said Louise E. Shanks, subject to the estate therein as tenant by the curtesy of the said Joseph D. Gaskins, which was by him, by his deed bearing date on the 15th day of August, 1904, released and conveyed to the said Louise E. Shanks under and by her then name of Louise E. Sobral, and by reason of the premises, that heretofore, to-wit, on the 1st day of January, in the year 1907, the said plaintiffs were seized and possessed in fee simple absolute, the said Newtie E. Hunter as to an undivided one-half part or interest, the said Robert I. Hunter as to an undivided one-fourth part or interest, and the said Louise E. Shanks as to the remaining one-fourth part or interest, of

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a certain lot, piece or parcel of land, situate, lying and being on the western side of Amelia street, between Lee and North streets, in the village of Huntersville, in Tanner's Creek Magisterial District of the county of Norfolk, in the State of Virginia known, numbered, and designed as lot numbered twenty-four (24) on the plat filed in the suit of I. R. Hunter *versus* J. D. Gaskins, lately depending in the Corporation Court of the city of Norfolk, marked 'Plan of a Part of Huntersville,' and also recorded in the clerk's office of the said county of Norfolk, in map book No. one (1), at page thirty (30), which said lot is bounded, with reference to said plat, as follows, to-wit: Beginning on the western line of a street which is now called Amelia street, opposite the site of the late residence of the said Isaac R. Hunter, deceased, at a point distant in a southerly direction measured along the said western line of Amelia street, twenty-eight (28) feet from the intersection of the said western line of Amelia street with the southern line of North street: running thence, in a southerly direction, along the said western line of Amelia street, twenty-eight (28) feet; thence in a westerly direction, parallel with the said southern line of North street, ninety-nine (99) feet; thence in a northerly direction, parallel with the said western line of Amelia street, twenty-eight (28) feet; and thence, in an easterly direction, parallel with the said southern line of North street, ninety-nine (99) feet, to the point or place of beginning, which said lot, piece, or parcel of land is part of the same land that was conveyed by the deed of the said Isaac R. Hunter hereinbefore set out, and acquired by the said Robert I. Hunter, Newtie E. Hunter, and Louise E. Shanks as hereinbefore mentioned. And the said plaintiffs say that, they being so seized and possessed of the said lot of land, the said defendants, W. H. Hicks and the Calvert Mortgage and Deposit Company of Baltimore City, afterwards, to-wit, on the 2nd day of January, in the year 1907, entered into said premises and exercised acts of ownership thereon and claimed title thereto, and that they, the said

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defendants, W. H. Hicks and the Calvert Mortgage and Deposit Company of Baltimore City, unlawfully withhold from the said plaintiffs the possession thereof, to the damage of the said plaintiffs of five hundred dollars (\$500). And therefore they bring their suit," etc.

The assignments of demurrer were as follows:

"(A) That as shown by said declaration, the plaintiffs claim title to the land therein set out and described under a certain deed in said declaration set out from Isaac R. Hunter to V. O. Cassell, trustee, which deed in a certain cause lately pending in this court, entitled Robert I. Hunter et al. v. Henry C. Cooper et al., wherein the said plaintiffs in this cause were plaintiffs and the defendants in this cause were defendants, was construed, and by a decree entered therein by this court on its chancery side the said plaintiffs were declared not entitled to the land set out and mentioned in the bill filed in said cause, of which the lot of land set out and mentioned in the said declaration filed in this cause is a part. The bill in said cause of Robert I. Hunter et al. v. Henry C. Cooper et al., the petition of the said the Calvert Mortgage and Deposit Company of Baltimore City, its answer and demurrer, the decree filing said demurrer and answer, and the final decree therein and herewith filed, marked 'Exhibit No. 1.'

"(B) Because, as shown by the deed aforesaid, from Isaac R. Hunter to V. O. Cassell, trustee, set out in said plaintiff's declaration, it appears that it was the intention of the said Isaac R. Hunter to grant unto the said trustee for the benefit of Martha Louisa Hunter only a life interest in the land conveyed, with a power to sell by and with the co-operation and assent of the said V. O. Cassell, trustee, during her lifetime, and not to create a fee simple estate in the said Martha Louisa Hunter, and that, by signing and sealing the said deed, Martha Louisa Hunter agreed to all the provisions thereof, and that, therefore, at the death of said Martha Louisa Hunter under the terms, limitations, and agreements contained in the said deed

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all interest of the said Martha Louisa Hunter in said land ceased and determined.

“(C) That, under the said deed aforesaid, set out in said declaration, from Isaac R. Hunter to V. O. Cassell, trustee, Martha Louisa Hunter, under whom the plaintiffs claim, took only a life estate in the lands set out in said deed, of which the lot claimed in this cause forms a part, which life estate upon the death of the said Martha Louisa Hunter ceased and determined.

“(D) That under the deed aforesaid set out in said declaration from Isaac R. Hunter to V. O. Cassell, trustee, the plaintiffs have no title to the land sought to be recovered in this action.

“(E) Because the said declaration does not show that the plaintiffs at the time of the filing of said declaration were entitled to recover the said lot of land set out in said declaration.

“(F) Because of the decision in the suit of Robert I. Hunter et al. v. Henry C. Cooper et al., the title to the lot of land sought to be recovered in this action is *res adjudicata*, and the said plaintiffs in that suit cannot recover in this action the lot of land sought to be recovered in that cause.”

*Leo Judson*, for the plaintiffs in error.

*Wm. McK. Woodhouse, Hugh C. Davis and Hugh W. Davis*, for the defendants in error.

KEITH, P., delivered the opinion of the court.

This is an action of ejectment brought by Robert I. Hunter and others against W. H. Hicks and others to recover a tract of land lying in the county of Norfolk.

There was a demurrer to the declaration, which was sustained

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by the circuit court, and judgment entered for the defendants, and that judgment is before us upon a writ of error.

The decision of the case involves a construction of a deed which is copied into the declaration, to which the defendants in the circuit court assigned six grounds of demurrer, designated as a, b, c, d, e and f. Specifications "a" and "f" were overruled; "b," "c," "d" and "e" were sustained, and the correctness of the judgment turns upon whether or not Martha Louisa Hunter took a fee simple or a life estate in the land conveyed to her by the deed from Isaac Hunter.

By the deed Martha Louisa Hunter is given full power to sell and dispose of the property covered by it, "and make such disposition of the proceeds of sale as she may think proper, and also through said trustee to collect the said notes, and deliver them to the makers or other proper person and dispose of their proceeds, always, however, and in all cases, with the co-operation and assent of the said V. O. Cassell, trustee, who on his part agrees to execute such instruments as may be needful in the premises as the said Martha Louisa Hunter may direct by her becoming a party to and signing said instrument. And the said Martha Louisa Hunter may also if she think proper with the proceeds as aforesaid purchase other property, real or personal, through and by her said trustee, and the deed made to said trustee for her sole benefit, and to be held upon the same terms as the other property herein mentioned. If the said Martha Louisa Hunter should depart this life leaving her said husband, the grantor in this deed, surviving, then this grant as to the property then remaining is to cease and determine, but she shall have power and full authority is hereby given her by instrument in the nature of a last will and testament to dispose of one-half of the property hereinbefore described or hereafter acquired as aforesaid then remaining; but if the said Isaac R. Hunter should die first then and in that event he hereby expressly reserves to himself full power and authority to dispose of the other half of the property then remaining,

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hereinbefore described or hereafter acquired, by his last will and testament."

We have then a case where the grantee, Mrs. Hunter, under the deed from her husband, took property which she was authorized to sell and to dispose of the proceeds as she might think proper, and of what might remain at her death she had the power to dispose of one-half by her last will and testament.

We are of opinion that the case is fully covered by the decisions of this court.

"The cases cited clearly establish that whenever it is the intention of the testator that the devisee shall have an unrestrained power of disposition over the property devised, whether such intention be expressed or necessarily implied, a limitation over to another is void, because it is inconsistent with, and repugnant to, the estate given to the first devisee, although the will shows that it was the testator's intention, in respect to the property given to the first taker, that 'what may remain of the same,' or 'whatever may remain at his death,' or 'so much thereof as may be in existence at his death,' or 'such part as he may not appropriate,' or 'what may be on hand at his death,' should go to another. Such intention must fail on account of its uncertainty, and the first taker acquires the absolute property." *Farish v. Wayman*, 91 Va. 430, 21 S. E. 810, and cases there cited. See also *Honaker v. Duff*, 101 Va. 675, 44 S. E. 900; *Johnson v. Smith*, 108 Va. 725, 62 S. E. 958, 2 Va. App. 622; *Rolley v. Rolley's Ex'or*, ante, p. 454, 3 Va. App. 147; *Randall v. Harrison*, post, p. 686, and cases referred to in those opinions.

It follows that the judgment of the circuit court must be reversed.

*Reversed.*

Syllabus.

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**Mytherville.**

JORDAN & DAVIS AND OTHERS v. ANNEX CORPORATION  
AND OTHERS.

June 10, 1909.

Absent, Cardwell, J.

1. CORPORATIONS — *Promoters — Agency — Secret Profits.*— Although a promoter is not strictly an agent of, or a trustee for, a company before its creation, the rules of principal and agent and of trustee and beneficiary have been extended to meet such cases, and a promoter of such a company is accountable to it as if the relation of principal and agent, or of trustee and beneficiary had actually existed. His acts are carefully scrutinized, and he is precluded from taking a secret advantage of other stockholders.
2. CORPORATIONS — *Stock Subscription — Fraud — Rescission by Subscriber—Restitution—Case in Judgment.*—A stockholder in a joint stock company who has been induced to subscribe by fraudulent representations of material facts may, upon discovery of the fraud, elect to rescind his contract of subscription if he can restore what he has received in the same state or condition in which he received it, and sue for and recover back what he has paid or given. But where, as in the case in judgment, a company is organized to lease land and erect a building thereon, and two-thirds of the term of the lease have expired, the money paid in by the stockholders has been spent and the company is insolvent, this remedy is not available to such a stockholder, because the parties cannot be placed *in statu quo*.
3. CORPORATIONS—*Promoter's Profits—Rights of Promoter as Creditor.*— Although a corporation is entitled to recover from a promoter the amount of profits which he has made out of the secret agreement, he is not debarred, as a creditor for money advanced to the corporation, from sharing in the assets of the company along with its other creditors.



## Opinion.

Appeal from a decree of the Circuit Court of the city of Norfolk. Decree in part for defendants. Complainants appeal.

*Affirmed.*

In addition to the facts stated in the opinion of the court, it may be added that the Lowenberg Corporation owned one-half of the stock of the Pine Beach Corporation, and that the remaining one-half thereof was owned by one other person. The defendants claim that one-half of the \$5,000 rent would therefore go to the Lowenberg Corporation, and that the other half was given to it by the other stockholder of the Pine Beach Hotel Corporation as a *bonus* for procuring the lease of the Annex Corporation and the erection of the building.

*R. Randolph Hicks*, for the appellants.

*Loyall, Taylor & White* and *H. H. Rumble*, for the appellees.

BUCHANAN, J., delivered the opinion of the court.

Prior to March 14, 1907, W. G. Davis and R. E. Jordan, partners trading as Jordan & Davis, Garrett Smith and Benjamin Lowenberg obtained a charter of incorporation under the name of the Annex Corporation, for the purpose of conducting a hotel business. The firm of Jordan & Davis, Smith and Lowenberg each subscribed for five thousand dollars of its capital stock, which was fully paid up. Subsequently, each of the said shareholders made advances for the purpose of carrying on the business.

On the 14th of March, 1907, the Annex Corporation entered into an agreement with the Pine Beach Hotel Corporation, by which it leased from the latter a certain parcel of land upon which it agreed to erect a hotel building of the dimensions

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named in the lease, and to have it ready for use not later than June 1 of that year, and to operate it in the manner provided therein to the end of the Jamestown Exposition, scheduled to close November 30, 1907. It was further provided, among other things, that the lessee was to pay the lessor, as rent, \$5,000 and ten *per cent.* of the gross receipts from all sources from the operation of the hotel, was to remove the building within 30 days from the expiration of the lease, and in the event of non-payment of the rent or any other breach of the agreement during the lease on the part of the lessee, the lessor had the right to cancel the lease and take possession of the building and all the assets of the lessee therein, and to operate the same upon certain conditions.

The building provided for was erected and the business conducted until September of that year by the lessee corporation, when Jordan & Davis and Smith instituted this suit.

Briefly stated, and as far as is material to the questions involved in this appeal, in addition to what has already been stated, the complainants (appellants here) allege in their bill that B. Lowenberg, before the creation of the Annex Corporation, represented to them that he had an option from the Pine Beach Hotel Corporation to erect and operate a hotel upon lands adjoining it upon the terms and conditions above stated; that he proposed to organize a corporation to be known as the "Annex Corporation" with a minimum capital of thirty thousand dollars, of which \$15,000 was to be preferred and paid for in cash; that he requested the appellants each to subscribe for \$5,000 of the preferred stock, and stated that he would subscribe for the other \$5,000; that they inquired of him whether or not there were any promotor's fees or secret profits coming to him, and upon his replying there were not and that he and they would become stockholders upon the same terms, they, relying on those representations, subscribed for \$5,000 each of the said preferred stock, applied for and obtained the charter under the name of the "Annex Corporation."

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in which the appellants, Jordan and Smith, respectively, were named as president and vice-president, and said Lowenberg as secretary and treasurer, and all were named as directors; that after the organization of the company it made the agreement hereinbefore referred to with the Pine Beach Hotel Corporation, erected and equipped the hotel as required by the lease, and opened the same, expecting large profits to accrue from its operation by reason of the fact that the Jamestown Exposition would be in progress during the term of the lease; but that up to the time of filing their bill their expectations had not been realized and the hotel had been operated at a loss. It was further alleged in the bill that they had just discovered that the \$5,000 which the lease provided to be paid to the lessor was a fiction, and that the real agreement between Lowenberg and the Pine Beach Hotel Corporation was that Lowenberg and the Lowenberg Corporation, of which he was a stockholder, should receive that sum as a promotor's fee, and that it was put in the lease as rent by collusion between the lessor and Lowenberg and the Lowenberg Corporation; that of the said \$5,000 \$2,500 was paid in cash, and a note for \$2,500 made by the lessee to the lessor, and immediately both were turned over by it to the Lowenberg Corporation, which was a large stockholder in the lessor corporation; that in addition to the amounts due the appellants on account of the fraudulent representations made, the Annex Corporation was indebted in the sum of about \$12,000, and that its only asset was the hotel operated by it which was worth nothing more than what the lumber in it would sell for; that the Annex Corporation had been unable to pay the ten *per cent.* of its gross income to the lessor as provided for by the lease; that if the lessor, for the failure to pay the rent should take possession and operate the hotel as it had a right to do under the terms of the lease, it would result in loss to all concerned, and this fact was recognized by the lessor since it was threatening to have the Annex Corporation placed in the hands of a receiver.

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The Pine Beach Hotel Corporation, the Annex Corporation, the Lowenberg Corporation, and Benjamin Lowenberg, were made parties defendant to the bill.

The prayer of the bill was that the appellants' subscriptions to the stock of the Annex Corporation be annulled; that it be adjudged insolvent and dissolved, and a receiver appointed to distribute its assets to those entitled thereto; that the defendants be required to return to it the said \$5,000 unlawfully obtained from it as rent, and apply the same to the liquidation of the claim of appellants; and that so much of their claims as is not thus paid the defendants be required to pay; and for general relief.

The trial court refused to annul the subscriptions of appellants to the stock of the Annex Corporation, holding them to be valid and binding; required B. Lowenberg and the Lowenberg Corporation to pay to the receivers who had been appointed in the cause the sum of \$2,500 with interest, and directed the \$2,500 note given for the residue of the alleged rent to be surrendered and cancelled; and directed the moneys advanced by the said stockholders in excess of their subscriptions to be paid *pro rata* out of the proceeds of the assets of the Annex Corporation. From that decree this appeal was taken by Jordan & Davis and Garrett Smith.

The first error assigned is to the action of the court in refusing to annul or rescind the contracts of subscription made by the appellants to the stock of the Annex Corporation.

Although a promotor is not strictly an agent of or a trustee for a company before its creation, the principles of law of principal and agent and of trustee and beneficiary have been extended to meet such cases, and a promotor of such a company is accountable to it as if the relation of principal and agent, or of trustee and *cestui que trust*, had actually existed. His acts are carefully scrutinized, and he is precluded from taking a secret advantage of other stockholders. See *Sydney, &c. Iron Ore Co. v. Bird*, 33 Chy. Div. 85; *Dickerman v.*

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*Northern Trust Co.*, 176 U. S. 181, 44 L. Ed. 423, 20 Sup. Ct. 311; *Va. Land Co. v. Haupt*, 90 Va. 533, 537, 19 S. E. 168, 44 Am. St. Rep. 939; *Central Land Co. v. Oberchain*, 92 Va. 130, 143, 22 S. E. 876, and note to *Telegraph, &c. v. Christian, &c.*, 4 Am. & Eng. Ann. Cases, pp. 669-70.

Where a party has been induced to enter into a contract by fraud, he has in general, as was said in the case of *Wilson v. Hundley*, 96 Va. 96, 100, 30 S. E. 492, 70 Am. St. Rep. 837, the choice of two remedies. He may elect to rescind the contract, if he can restore what he has received in the same state or condition in which he received it, and sue for and recover back the consideration he has paid or given; or, if he has not paid anything, repudiate the contract and rely when sued upon fraud as a complete defense; or he may elect to retain what he has received under the contract and bring an action to recover damages for the injury he has sustained by the deceit.

For the fraud of B. Lowenberg, which the evidence clearly establishes, either the Annex Corporation or the appellants had a cause of action. But under the facts of the case there could be no rescission of the agreement to lease or of the appellants' contracts of subscription, because of the changed condition of affairs. When this suit was brought, two-thirds of the time during which the lease was to run had expired, the money paid in by the stockholders had been spent and the corporation was insolvent. The parties could not be placed *in statu quo*. The only relief, therefore, that can be had in this case is the recovery of the promotor's fees or profits made by B. Lowenberg or the Lowenberg Corporation. This relief the trial court gave.

It is insisted by the appellees, upon cross-assignment of error, that in no event were the profits or fees of the promotor more than one-half of the five thousand dollars, because, as is claimed, the Lowenberg Corporation was really entitled to one-half of the five thousand dollars as rent, and that only the

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other half, which was ostensibly due the Pine Beach Hotel Corporation, was the promotor's fee or profit.

The trial court was of opinion that the whole sum of \$5,000 agreed to be paid as rent was promotor's profits, and under all the facts and circumstances of the case we cannot say that it erred in so holding.

The remaining assignment of error is to the action of the trial court in permitting B. Lowenberg and Pine Beach Hotel Corporation to participate as creditors in the restored promotor's profits.

While the corporation is entitled to recover from the promotor the amount of profits which he has made out of the secret agreement, we know of no rule of law or of equity which deprives him as a creditor of the corporation for money actually advanced by him in carrying on its business, from sharing in its assets along with its other creditors.

We are of opinion that there is no error in the decree appealed from and that it should be affirmed.

*Affirmed.*

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Statement.

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**Mytheville.**

LAMBERT v. PHILLIPS &amp; SON.

June 10, 1909.

1. PRINCIPAL AND AGENT—*To Whom is Credit Given—Presumption.*—If an agent makes full disclosure of his principal to one with whom he is dealing, the legal presumption is that credit is given to the principal and not to the agent, unless it further appears that credit was expressly and exclusively given to the agent.
2. CONTRACTS—*Principal and Agent—To Whom is Credit Given—Independent Contractor.*—Whether an independent contractor, or the owner, or the lessee of a building is liable for materials furnished for an improvement of the building depends upon the question, to whom was credit given. Where an independent contractor is sued, the fact that he was an independent contractor is to be considered along with all the other facts and circumstances in determining to whom credit was given, but is not decisive of that question.
3. INSTRUCTIONS—*Partial View of Evidence.*—An instruction should not be given which calls the attention of the jury to one question specifically, with but little reference to other questions involved in the case, as it tends to impress unduly on the jury that question and the facts bearing upon it, to the disadvantage of the other evidence in the case bearing upon the issue to be determined.

Error to a judgment of the Circuit Court of the city of Richmond in an action of *assumpsit*. Judgment for the plaintiffs. Defendant assigns error.

*Reversed.*

The opinion states the case.

The following are the instructions given for the plaintiffs referred to in the opinion of the court:

Statement.

No. 1. "The court instructs the jury, that a person who is skilled in the performance of a particular kind of work, and who on account of his skill is employed to do a piece of work, without restriction upon the means to be employed in doing the work, and employs his own labor, which is subject alone to his control and direction, and undertakes to do the work, either according to his own ideas, or in accordance with plans furnished by a person for whom the work is done, is an independent contractor, and his character as an independent contractor is not affected by the fact that his compensation is measured by a percentage to himself upon the work to be done. And the court instructs the jury, that if they believe from the evidence that the Allen Hotel Company contracted with G. W. Lambert for the repairs to be done on the building at 9th and Broad streets and that the said G. W. Lambert had the right to employ and discharge the men doing the work on said building as well as the right to control as to the method of doing the work, and that the said G. W. Lambert contracted for materials, labor, etc., necessary for said work, then the court instructs the jury, that the said G. W. Lambert was a contractor with the Allen Hotel Company and was not its agent or servant; and if the jury believe from the evidence that the plaintiffs contracted with said Lambert as an independent contractor to do the painting and plumbing, and not with said Allen Hotel Company, then the jury should find for the plaintiffs.

No. 2. "The court instructs the jury, that although they may believe from the evidence that G. W. Lambert was the agent and servant of the Allen Hotel Company, and was not an independent contractor, yet if the jury further believe from the evidence that the said G. W. Lambert did not disclose to the plaintiffs his alleged agency at the time the work was ordered to be done, and that the plaintiffs agreed to do the work on the faith and credit of the said Lambert, and not for said Lambert as agent, then the jury should find for the plaintiffs, notwith-



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standing they may believe that the said Lambert was acting as agent as aforesaid."

*Wm. L. Royall*, for the plaintiff in error.

*John A. Lamb*, for the defendants in error.

BUCHANAN, J., delivered the opinion of the court.

Phillips and Son instituted their action of *assumpsit* against G. W. Lambert to recover the value of certain work and labor done and materials furnished by them as plumbers on two houses situated in the city of Richmond, one at the corner of Broad and Ninth streets, and the other on the corner of Broad and Tenth streets. The property was owned by the Richmond Realty Company, but at the time the said work was done and materials furnished was leased to one Jake Wells, who had employed Lambert to superintend the making of the improvements which he was having put on the property. The question involved in the case is whether or not Lambert was personally responsible to the plaintiffs for the work done and materials furnished by them.

There was a verdict and judgment for the plaintiffs. To that judgment this writ of error was awarded.

The errors assigned are to the action of the court in giving two instructions asked for by the plaintiffs, the refusal to give instruction "A" offered by the defendant, and the giving of the court's own instruction in lieu thereof.

The instruction given by the court in lieu of the defendant's instruction is as follows: "The court instructs the jury, that the existence and character of the relation between the plaintiffs and the defendant, depending upon a verbal contract, it is the province of the jury to determine from the whole evidence in the case, what was the relation between the parties. The court instructs the jury, that if they believe from the evidence

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that Lambert was not an independent contractor, as defined in these instructions, but was merely an agent to supervise improvements to be made at the corner of Ninth and Broad streets, and also if they further believe from the evidence that he (Lambert) made full disclosure of his principal to the plaintiffs, and that credit was given by the plaintiffs to the Hotel Allen Company, and not to the defendant, then the jury should find for the defendant."

This instruction is, we think, erroneous. If, as it hypothetically states, Lambert was merely the agent of Jake Wells, or the Allen Hotel Company, to supervise the improvements to be made upon the property, and made full disclosure of his principal to the plaintiffs, Lambert was not responsible for the work done and materials furnished unless credit was given to him expressly and exclusively.

Chancellor Kent, in volume II of his commentaries, side-page 629, says: "Every contract made with an agent in relation to the business of the agency is a contract with the principal, entered into through the instrumentality of the agent, provided the agent acts in the name of the principal. The party so dealing with the agent is bound to his principal, and the principal and not the agent is bound to the party. It is a general rule, standing on strong foundations and pervading every system of jurisprudence, that where an agent is duly constituted and names his principal and contracts in his name, and does not exceed his authority, the principal is responsible and not the agent. The agent becomes personally liable only when the principal is not known, or where there is no responsible principal, or where the agent becomes responsible by an undertaking in his own name, or where he exceeds his power."

In note 1 American Leading Cases, 454, it is said, that when the relation of principal and agent exists in regard to a contract, and is known to the other party to exist, and the principal is disclosed at the time as such, the contract is the contract of the principal, and the agent is not bound unless

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credit had been given to him expressly and exclusively and it was clearly his intention to assume a personal liability."

In *Mechem on Agency*, section 558, it is said: "Where dealings are had with the agent of a known principal, the legal presumption is, as has been said, that the credit was given to the principal, rather than to the agent personally, and this presumption will prevail in the absence of evidence that the credit was given exclusively to the agent and the burden is upon the party alleging it." See also *Meeker v. Cleghorn*, 44 N. Y. 349; *Humes v. Decatur Land Co.*, 98 Ala. 461, 13 South. 368; *Strider v. Wench, &c.*, 21 Gratt. 440, 445; *Story on Agency*, sec. 447; 1 *Am. & Eng. Enc. L.*, 1120; *Clark & Skyles on Law of Agency*, sec. 565.

If the jury believed from the evidence that Lambert was the agent of the party having the improvements made, and that he (Lambert) made full disclosure of his principal to the plaintiff, then the legal presumption was that the credit was given to the principal and not to the agent, unless it further appeared that the credit was expressly and exclusively given to the agent, and the instruction ought to have been so framed as to make this plain to the jury.

From what has been said it is clear that the defendant's instruction "A" was plainly erroneous and was properly refused by the court.

We are further of opinion that instructions Nos. 1 and 2, given at the request of the plaintiffs, were misleading. Lambert may have been an independent contractor in making the improvements upon the said buildings, and responsible to his employees and third persons for injuries resulting from his negligence in doing that work, and yet the owners or lessee of the property may have been responsible to the plaintiffs for the work and labor done and materials furnished. Whether Lambert or the owner or lessee was liable to the plaintiffs depended upon the question, to whom was the credit given. The fact that Lambert was or was not an independent contractor was

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a fact to be considered along with all the other facts and circumstances of the case in determining to whom the credit was given by the plaintiffs, but it was not decisive of that question. All the instructions given, and especially No. 1, call the attention of the jury to that question specifically, with but little reference to other questions involved in the case, thus tending to impress unduly on the jury that question and the facts bearing upon it, to the disadvantage of the other evidence in the case bearing upon the issue to be determined. Upon the next trial that should be avoided, and the jury left to determine upon all the facts and circumstances of the case to whom the credit was given by the plaintiffs in doing the work and furnishing the materials.

*Reversed.*

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Opinion.

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**Mytherville.**

LAMBERT v. PETERS.

June 17, 1909.

1. This case is ruled by *Lambert v. Phillips, ante*, p. 632.

Error to a judgment of the Circuit Court of the city of Richmond in an action of *assumpsit*. Judgment for the plaintiff. Defendant assigns error.

*Reversed.*

*Wm. L. Royall*, for the plaintiff in error.

*John A. Lamb*, for the defendant in error.

BUCHANAN, J., delivered the opinion of the court.

This case was heard with the case of *Lambert v. Phillips & Son, ante*, p. 632, upon the same record and involves the same questions.

For the reasons stated in the opinion in that case, handed down at this term of the court, the judgment in this case must be reversed, the verdict set aside, and the cause remanded for a new trial, to be had not in conflict with the views expressed in that opinion.

*Reversed.*

Syllabus.

**Mytherville.**

LYNCHBURG MILLING CO. v. NATIONAL EXCHANGE BANK OF  
LYNCHBURG.

June 10, 1909.

1. **DEMURRER TO EVIDENCE—Denial of Jury Trial.**—The right to demur to the evidence is no longer an open question in this State. The demurrer does not invade the province of the jury as triers of disputed facts, but, assuming that the evidence demurred to is true, the court is called upon to determine whether such evidence, as a matter of law, warrants a judgment for the demurree. It is a supervisory power invoked and exercised by the courts, whose duty it is to decide questions of law arising upon undisputed facts.
2. **NEGOTIABLE INSTRUMENTS—Holder for Value—Presumption.**—In a contest between the payee of a bill of exchange and the drawer thereof, or a creditor of the drawer, over the proceeds of the draft, the payee, by the very terms of the Negotiable Instruments Act, is presumed *prima facie* to be a holder for value, and the burden is on the party denying it to prove the contrary.
3. **NEGOTIABLE INSTRUMENTS—Holder for Value—Agent to Collect.**—Where a bank, in answer to a garnishment sued out by the drawee of a draft against the drawers thereof, states that it is not indebted to the drawers but holds the fund for a bank in another State, which was the payee of the draft, and forwarded it to the garnishee for collection, the facts that the non-resident bank employed no counsel to defend the suit, to which it was not a party, and stamped on the bill of lading attached to the draft that it was not responsible for the quantity, quality or delivery of the goods, and endorsed the draft without recourse, and that the drawers waived protest and notice, and that the draft which had been once returned was afterwards forwarded, with a pencil memorandum attached bearing the initials of the drawers: "Please send back and present again," are not inconsistent with the payee's *bona fide* ownership of the draft, and

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do not overcome the legal presumption that it is a holder for value, and not a mere agent for collection.

4. APPEAL AND ERROR—*Harmless Error*.—This court will not reverse a case for the exclusion of evidence by the trial court which could not have affected the result.

Error to a judgment of the Corporation Court of the city of Lynchburg in an action of *assumpsit*. Judgment for the defendant. Plaintiff assigns error.

*Affirmed.*

The opinion states the case.

*Harrison & Long*, for the plaintiff in error.

*Caskie & Coleman*, for the defendant in error.

WHITTLE, J., delivered the opinion of the court.

The plaintiff in error, the Lynchburg Milling Company, brought an action of *assumpsit* against the White and Rumsey Grain Company of Chicago, Illinois, for the recovery of \$550. at the same time issuing an ancillary attachment and designating the defendant in error, the National Exchange Bank of Lynchburg, Virginia, as being indebted to and having effects of the defendant in its possession.

The Exchange Bank answered, denying the suggestion, but stated by way of explanation that it had received from and on account of the Continental National Bank of Chicago a draft drawn by the defendant, the White and Rumsey Grain Company, on the plaintiff, the Lynchburg Milling Company, in favor of the Chicago bank for \$533.35 for collection—to which draft a bill of lading was attached for a carload of oats shipped by the defendant to the plaintiff; that the draft was paid by the plaintiff to respondent, and the amount placed to the credit of the Chicago bank, but the fund was not remitted because of the pendency of the attachment. Whereupon, the plaintiff suggested that the garnishee had not fully answered, and a

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jury was impaneled to inquire whether the amount in the hands of the Exchange Bank was the property of the defendant, the White and Rumsey Grain Company, or of the Chicago bank.

At the conclusion of the testimony for the plaintiff on that issue, the Exchange Bank demurred to the evidence, and to a judgment sustaining the demurrer this writ of error was allowed.

The first assignment of error involves the action of the court in compelling the plaintiff to join in the demurrer to the evidence.

The plaintiff insists that it had an absolute right to a trial by jury under the statute of which it was deprived by the court's action in requiring it to join in the demurrer. But that assignment is founded on a misconception of the office of a demurrer to evidence. It does not invade the province of the jury as triers of disputed facts, but, assuming that the evidence demurred to is true, the court is called on to determine whether such evidence as a matter of law warrants a judgment for the demurree. In other words, it is a supervisory power over jury trials invoked and exercised by the courts whose duty it is to decide questions of law arising upon undisputed facts.

In 6 Ency. of Pleading and Practice, 439, it is said: "There is nothing in this practice which is in contravention of jury trial." Citing *Hopkins v. Nashville, &c. Ry. Co.*, 96 Tenn. 409, 34 S. W. 1029, 32 L. R. A. 354.

That case contains an exhaustive review of the authorities, and shows that the practice obtains in about one-half of the States of the Union, while in the United States courts and the courts of other States much more drastic methods prevail, such as directing verdicts and ordering non-suits. The practice has come down to us from the common law and is too thoroughly embedded in our jurisprudence to admit of serious question.

The next assignment ascribes error to the ruling of the court in sustaining the demurrer to the evidence.



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As remarked, the sole issue of fact was whether the avails of the draft in the hands of the Exchange Bank were the property of the White and Rumsey Grain Company, or of the Chicago bank.

The Negotiable Instrument Act (Va. Code, 1904, sec. 2541a, 24), declares that "every negotiable instrument is deemed *prima facie* to have been issued for a valuable consideration, and every person whose signature appears thereon to have become a party thereto for value."

The Lynchburg Milling Company can stand on no higher ground in respect to this litigation than the maker of the draft. the White and Rumsey Grain Company, would have occupied at the suit of the Chicago bank. In either case, under the statute, the Chicago bank would *prima facie* be deemed a holder for value.

In addition to this *prima facie* presumption, the Lynchburg Milling Company put in evidence a letter written by the White and Rumsey Grain Company to the Exchange Bank, in which it expressly declares that the fund in controversy is "the property, not of our company, but of your correspondent, the Continental National Bank."

In the case of *Oeters v. Knights of Honor*, 98 Va. 201, 205-206, 35 S. E. 356, in discussing the effect of certain letters from the defendant to the plaintiff, Keith, P., in delivering the opinion of the court, observes: "They could not have been introduced by the defendant, but when offered by the plaintiff were, of course, admitted. The statements made in them were clearly relevant to the issue before the jury, are uncontradicted by any evidence in the record, and are, therefore, to be taken as tending to prove the facts stated in them. We need not undertake to measure and define their exact probative force and effect. It is enough that they are declarations of the defendant offered by the plaintiff, and are germane to the issue." Citing *Downer & Co. v. Morrison*, 2 Gratt. 238, 250.

In this state of the case the burden rested upon the plaintiff

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to prove that the White and Rumsey Grain Company was the owner of the fund and that the Chicago bank held the draft, not for value, but for collection merely. If that had been the true theory of the case, the Chicago bank would have had no interest in concealing the fact and the deposition of one of its officers would have put the question at rest.

The plaintiff, however, did not undertake to disprove the *prima facie* title of the Chicago bank by direct evidence, but chose rather to rely on certain circumstances as tending to sustain its contention. For instance, it was said that the Chicago bank had not asserted claim to the fund or employed counsel to maintain it. But the fact must not be lost sight of that the bank was not a party to the litigation, and, doubtless, preferred to leave the defense to the White and Rumsey Grain Company, which was a party, and would have been liable over to the payee in the event the fund was held subject to the plaintiff's attachment. In its correspondence with the Exchange Bank, the Chicago bank uniformly claimed the proceeds of the draft, and acted under the advice of counsel in Chicago.

Our attention has also been called to the circumstances, that the drawers waived protest and notice, and that after the draft had been dishonored and returned to the Chicago bank, the plaintiff wrote the defendant to return the draft and it would be promptly honored. When the draft came back the second time, there was a slip attached with a pencil memorandum bearing the initials of the White and Rumsey Grain Company, "please send back and present again;" and also, that the Chicago bank stamped on the bill of lading that it was neither responsible for the quantity, quality nor delivery of the goods, and indorsed the draft without recourse.

We do not regard these circumstances inconsistent with the Chicago bank's *bona fide* ownership of the draft. The drawer, a wholesale grain company, resided in Chicago and the draft was drawn on a customer in a distant State. In the event the draft was not paid, the Chicago bank would have had ready

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recourse against the drawer; and it seems to us that its action was not incompatible with ordinary business methods and the dictates of common prudence.

Lastly, the ruling of the court in excluding certain correspondence between the Lynchburg Milling Company and the White and Rumsey Grain Company is made the ground of exception.

The excluded letters if admissible possessed very little probative value and could not have affected the result, so that the error, if error there was, in excluding the letters was harmless.

Upon the whole case the judgment is plainly right and must be affirmed.

*Affirmed.*

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Statement.

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**Mytherville.**

McCROREY v. GARRETT.

June 10, 1909.

Absent, Cardwell, J.

1. NUISANCE—*Obstructing City Street—Overhanging Awning.*—The unauthorized obstruction of a city street by anything upon, above or below the surface is a nuisance, and, unless justified by legislative authority, the owner of an awning erected and maintained over a public street, becomes, as to persons lawfully using the street, an insurer. He maintains the same at his own peril, and anyone receiving an injury from such awning, being himself free from blame, has a good cause of action against the owner thereof, regardless of the question of his negligence in the construction and maintenance of such awning.
2. EVIDENCE—*Sickness of Witness—Proof of Testimony at a Former Trial.*—A party who knows when his case is called that a witness is sick and cannot attend, but goes into trial without moving for a continuance on that account, or mentioning the fact, is not entitled to have read to the jury the stenographer's report of the testimony of the witness given on a former trial of the case.

Error to a judgment of the Court of Law and Chancery of the city of Norfolk in an action of trespass on the case. Judgment for the plaintiff. Defendant assigns error.

*Affirmed.*

The opinion states the case.

M. R. Peterson and Thos. H. Wilcox, for the plaintiff in error.

Starke, Venable & Starke, for the defendant in error.

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HARRISON, J., delivered the opinion of the court.

This action was brought by A. E. Garrett to recover of J. G. McCrorey damages for injuries sustained by him from the falling of an awning which was maintained by the defendant over the pavement in front of his store on Main street in the city of Norfolk.

The record shows that the defendant was the lessee of a storehouse situated on the north side of Main street, in the city of Norfolk, in which he conducted a mercantile business. On the front of said store he had erected an adjustable awning, called "Coyle's frame," fifty feet in length, and weighing two hundred and fifty pounds. The flaps of the awning were elevated above the street seven feet, and the awning when lowered projected from the building over the sidewalk about five feet. On the day of the accident a high wind was blowing, and as the plaintiff was walking along the north side of Main street, the awning fell and struck him, causing the injuries complained of.

The trial resulted in a verdict and judgment for \$2,000, which we are asked to review.

The first assignment of error is that the lower court improperly overruled the defendant's demurrer to the first count of the declaration. The second assignment of error is that the court refused to grant for the defendant an instruction which is set out in bill of exceptions No. 3. The third ground of objection is to the action of the court in giving for the plaintiff an instruction which is set out in bill of exceptions No. 4.

These three assignments of error involve but one question, and they will, therefore, be considered together. The question presented by each is whether or not a person maintaining a movable awning in front of his place of business in a city, owes the duty of safety to the public using the street, and is liable to a person who, without fault on his part, is injured by its fall, regardless of the care or skill observed in its construction

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and maintenance. In other words, that the test of liability is not the lack of proper care on the part of the owner of the awning, but the fact of resulting injury, through no fault of his, to the party using the street.

It is well settled that public highways, whether they be in the country or in the city, belong, not partially but entirely, to the public at large, and that the supreme control over them is in the legislature. It is also an established general rule that any unauthorized obstruction which unnecessarily impedes or incommodes the lawful use of a highway is a nuisance at common law. *City of Richmond v. Smith*, 101 Va. 161, 43 S. E. 345.

So far as the right of the public to travel unmolested over the highway is concerned, the dominion of the people is absolute, and is not confined to obstructions on the surface of the street, but extends with equal emphasis to encroachments upon the public right either below or above the surface. Indeed, an obstruction above the street that may injure the traveler is more dangerous than one on the ground, because the latter is more readily seen and avoided.

In Wood on Nuisances (3rd ed.), Vol. I, sec. 275, the principle governing cases of this nature is stated as follows: "As has been previously stated, every person in traveling upon a public street has a right to absolute safety, while in the exercise of ordinary care, against all accidents arising from obstructions of or imperfections in the street, and this applies as well to what is in the street as to what is over it." Further this author says: "It would seem that all sign boards, cornices, blinds, awnings and other things projecting over a walk, or so situated with reference thereto that if they fall they may do injury to travelers, are nuisances unless so secured as to be absolutely safe, and the person maintaining them is liable for all injuries arising therefrom, except such as are attributable to inevitable accident."

In Elliott on Roads and Streets, sec. 647, it is said: "It is

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not necessary, in order to constitute a nuisance, that there should be an actual physical obstruction to the public use upon the surface of the highway, for its use may be rendered as dangerous by objects above the way as by obstructions upon the surface." And at section 613 it is said: "So, too, they are liable for negligently suffering awnings or structures to project over sidewalks and thus cause injury to those rightfully using the street." See also Dillon on Municipal Corporations, Vol. II, sec. 1033. The doctrine announced by these authors is supported by reason and authority. *Tarry v. Ashton*, 1 Q. B. Div. 314; *Salisbury v. Herchenroder*, 106 Mass. 458, 8 Am. Rep. 354; *Congreve v. Smith*, 18 N. Y. 79; *Clifford v. Dam*, 81 N. Y. 52; *Hanlon v. Carter Oil Co.*, 54 W. Va. 510, 46 S. E. 565, 66 L. R. A. 893; *Bohen v. City of Wareca*, 32 Minn. 136, 19 N. W. 730, 50 Am. Rep. 564; *McHarge v. Newcomer*, 117 Tenn. 595, 100 S. W. 700, 9 L. R. A. (N. S.) 298.

In *Congreve v. Smith*, *supra*, it is said: "The general doctrine is that the public are entitled to the street or highway in the condition in which they placed it; and whoever, without special authority, materially obstructs it, or renders its use hazardous, by doing anything upon, above or below the surface, is guilty of a nuisance; and, as in all other cases of public nuisances, individuals sustaining special damage from it, without any want of due care to avoid injury, have a remedy by action against the author or person continuing the nuisance. No question of negligence can arise, the act being wrongful."

In the case of *Clifford v. Dam*, *supra*, it is said: "The public are entitled to an unobstructed passage upon the streets, including the sidewalks of the city." And in speaking of the obstruction in that case, the court said: "It was not necessary to prove negligence. The action was not based upon negligence, but on a wrongful act for which the defendants were responsible."

These authorities, and others that might be cited, lead to

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the conclusion that, unless justified by legislative authority, the owner of an awning erected and maintained over a public street, becomes as to persons lawfully using the street an insurer. He maintains the same at his own peril, and anyone receiving an injury from such awning, being himself free from blame, has a good cause of action against the owner thereof, regardless of the question of his negligence in the construction and maintenance of such awning.

We are, therefore, of opinion that the three assignments of error under consideration are not well taken.

The only remaining objection that we need notice is that taken to the action of the court in refusing to permit the defendant to introduce the stenographic report of the testimony of Dr. S. E. Brown, taken at the first trial of the case; the ground for the introduction of the stenographer's notes being that Dr. Brown was ill and unable to attend.

This court has held, in a recent case, that where a witness has died between two trials, who was cross-examined by the attorney for the Commonwealth at the first trial, his testimony at the first trial may be proved on the second; but this case recognizes that different principles apply where the witness who testified at the former trial is living. *Parks v. Commonwealth*, *post*, p. 807, 63 S. E. 462, 2 Va. App. 903.

In the case at bar, the record shows that the absent witness was confined to a hospital in the city of Norfolk with an attack of typhoid fever. The defendant knew when the case was called for trial that this witness was absent and could not be present at that trial, but nothing was said until the trial was in progress, when the offer was made to introduce the stenographer's notes of this witness' testimony taken at a former trial. If the evidence of this witness was material, the defendant should, when the case was called, have moved for a continuance in order that he might secure the presence of the witness at some subsequent time, and not have waited until the trial was in progress to substitute for the living witness the stenographer's



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notes of his evidence at a former trial. This is not permissible under our practice. See *Wise Terminal Co. v. McCormick*, 107 Va. 376, 58 S. E. 584, 1 Va. App. 442.

We find no error in the judgment complained of, and it must be affirmed.

*Affirmed.*

## Statement.

**Mytherville.**

MILLER, TRUSTEE, v. SMITH AND OTHERS.

June 10, 1909.

1. **APPEAL AND ERROR—Decree of Appellate Court—Finality—Res-Judicata—What is Concluded—Ex Parte Settlements—Surcharge and Falsification.**—When the *ex parte* settlements of a trustee have been surcharged and falsified by a bill filed for that purpose, and the decree of the trial court has been affirmed by this court with respect to all items of surcharge and falsification, it is a finality not only with respect to the particular items to which the attention of the court was called, but with respect to all the accounts which the trustee had settled before the institution of the suit. New items existing when the former decree was made cannot, as a rule, be added by the trial court when the case is remanded. The former adjudication applies not only to matters actually then adjudicated, but to every point which properly belonged to the subject of litigation, or which the parties, exercising reasonable diligence, might have brought forward at the time.
2. **WITNESS—Credibility—Positive and Negative Statements.**—Where the statements of two witnesses, equally credible, conflict, the positive statements of one, corroborated by the attitude of the other with reference to the subject of controversy, should prevail over the mere negative statements of the other.

Appeal from a decree of the Circuit Court of Rappahannock.  
Decree for complainants. Defendant appeals.

*Reversed.*

The opinion states the case.

*H. G. Moffett and J. A. C. Keith*, for the appellant.

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*E. T. Jones, James F. Strother and O'Flaherty & Fulton,*  
for the appellees.

KEITH, P., delivered the opinion of the court.

This cause is a sequel to that of *Smith v. Miller*, reported in 98 Va. at page 535, 37 S. E. 10. The parties then before the court are before us now, either in person or by representation.

The original bill was filed to surcharge and falsify the *ex parte* accounts of Robert E. and John B. Miller, who were the trustees of John Miller under a deed dated October 5, 1872. Those accounts had been regularly settled and confirmed in the county court of Rappahannock. The bill alleged that the trustees had failed to charge themselves with a large number of items with which they were properly chargeable, varying in amounts from a sum as small as \$5.00 up to one amounting to as much as \$2,650. These items are mentioned to show the care with which the accounts were scrutinized by the parties in interest when the bill was filed to surcharge and falsify them.

Another ground of complaint in the bill was that the trustees had become purchasers at the sale made by them of two parcels of land, one containing 275 acres and the other 600 acres, known as the "Hog Back" tract.

The circuit court, as the result of a long and tedious litigation, the record of which covers nearly 800 pages, sustained some of the items surcharged and falsified in the bill and overruled others, and denied the relief prayed as to the two tracts of land just mentioned.

On appeal by the plaintiffs from this decree, this court was of opinion that the decree was erroneous with respect to the two tracts of land containing, respectively, 275 and 600 acres, and to that extent reversed the decree; but it was "further decreed and ordered that in all other respects the said decree of February 12, 1898, be affirmed." The cause was remanded for further proceedings, as a result of which the lands before

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mentioned were resold at a price considerably in excess of that which they had brought at the first sale; accounts were ordered, reported and excepted to, with the result that decrees were entered in June, 1908, and at the July term, 1908, by which John B. Miller was charged with the sum of \$600 with interest thereon from the 14th day of April, 1882, and with one-fourth of the proceeds of the resale of the "Hog Back" tract.

Though the accounts of the trustees, which had been regularly settled and confirmed, were closely scrutinized by the parties in interest, neither in the court below nor in this court was the item of \$600, now in dispute, ever referred to. It appears in the original record at page 124, under date of April 14, 1881, as a credit to the trustees of cash paid the administrator of Mary Miller; but it does not appear that the trustees charged themselves with that sum. If it was improperly omitted, it was a proper subject of surcharge and falsification, which the parties had ample opportunity to make.

Our procedure with respect to surcharge and falsification of settled accounts is liberal and simple. As far back as *Shugart's Admr. v. Thompson's Admr.*, 10 Leigh, 452, it was held that where on an order of account proofs are adduced, which, though they do not sustain the specific objections taken to the bill, ascertain that the settlement may be justly surcharged in other respects, although according to the strictest and most formal practice the plaintiff may be required to amend his bill and urge therein the objections made to the settlement shown by the evidence, yet it is competent for the court to dispense with this proceeding, and permit the plaintiff to proceed in respect to the objections shown by the evidence in like manner as if they had been noticed by the bill. But if the defendant objects that he was surprised by the new objections to the account, the court may and ought to give him time to combat them; and if he urge the privilege he would have by answer to an amended bill, to explain and defend the account in these

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respects, such privilege should be secured to him, by allowing him to file his affidavit containing such explanation and defense, and by giving to such affidavit the like credit and effect, as his answer containing the like matter would be entitled to.

In *Corbin v. Mills*, 19 Gratt. 438, it is said: "The accounts of an executor which have been regularly settled in the mode prescribed by law, are to be taken as *prima facie* correct. They are liable to be impeached on specific grounds of surcharge and falsification to be alleged in the bill, but the court will not decree an account, upon a general allegation that the settled accounts are erroneous. When an account has been ordered upon a proper bill, if an additional objection to the settled accounts is discovered in the progress of the cause, the plaintiff may raise the objection before the commissioner, with a proper specification in writing, and the defendant may meet the objection by an affidavit, which shall have the same weight as an answer would have had if the matter had been alleged in the bill." And that is the established mode of procedure in this State. *Dickinson v. Helms*, 29 Gratt. 466; *Leake's Exor. v. Leake*, 75 Va. 804; *Blackwell's Admr. v. Bragg*, 78 Va. 540; *Davis v. Morris*, 76 Va. 34.

The accounts of the trustees, therefore, which were regularly settled before the county court of Rappahannock, are *prima facie* correct, except so far as they were surcharged and falsified in the mode indicated; and this remedy was open to any party in interest who felt himself aggrieved.

When the circuit court entered its decree, and that decree was appealed from and with respect to all items of surcharge and falsification was affirmed by this court, it was a finality, not only with respect to the particular items to which the attention of the court was called, but with respect to all the accounts which the trustees had settled before the institution of the suit.

"Every decision of the court of appeals, whether it be upon an interlocutory or a final decree, is in its nature final \* \* \* and the quality of finality is imparted to the decree appealed

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from, whether that decree was final or interlocutory." *Mathews v. Progress Distilling Co.*, 108 Va. 777, 62 S. E. 924; *Campbell's Ex'or v. Campbell's Ex'or*, 26 Gratt. 649.

Appellant, therefore, may well rely upon his plea of *res judicata*, which applies, except in special cases, not only to all matters actually adjudicated on the former hearing, but to every point which properly belonged to the subject of litigation, or which the parties, exercising reasonable diligence, might have brought forward at the time. *Diamond State Iron Co. v. Rarig*, 93 Va. 595, 25 S. E. 894.

Every litigant should have opportunity to present whatever grievance he may have to a court of competent jurisdiction; but having enjoyed that opportunity and having failed to avail himself of it, he must accept the consequences. "It is to the interest of the republic that there should be an end to controversy."

We are of opinion that the circuit court erred in charging the appellant with the sum of \$600 and accrued interest.

With respect to the other assignment of error, it appears to depend upon a question of fact. John B. Miller, the appellant, executed to Edward T. Jones a bond for \$400, of date February 5, 1903. On September 23, of that year, that bond with its accrued interest was paid. In Miller's deposition he states, that this bond was the result of a settlement between himself and Mr. Jones, in which he was charged with \$341.51, which he claims was the one-fourth interest of Mr. Jones in right of his wife in the original sale of the "Hog Back" tract; a fee, for which Mr. Jones held him responsible, of \$25.43; and one-fourth of \$187.70 due Mr. Jones as administrator, making an aggregate of \$413.21. For some reason, which does not clearly appear from the record, the item of \$341.51 was reduced to \$318.81, making together with the other items \$390.51, to which was added \$9.49 for sundries, and the bond given for

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the aggregate sum of \$400, which has been paid as before stated.

Mr. Jones in his statement admits that the exhibit filed with Miller's deposition is in his handwriting, but says that he cannot recall how the figures were reached. Miller claims that Mr. Jones agreed not to hold him responsible for the profits on the resale of the "Hog Back" tract, because he (Jones) had thought that the sale made by the trustees, which was subsequently annulled by a decree of the court of appeals, was a good one, and that Miller should be held to it; but this Mr. Jones, in his statement referred to, denies. Mr. Miller's recollection of the transaction is in a measure corroborated by the depositions given by himself and R. E. Miller in this suit (see original record, pp. 399, 510), in which it is shown that Jones considered the price at which the land sold was a good one and more than he (Jones) or anyone else would give for it; and these statements are nowhere denied in the record.

When we consider that the deposition of the appellant, John B. Miller, is clear and positive; that it is fortified by the production of a statement in the handwriting of Mr. Jones, and is corroborated by the attitude of the latter with respect to the sale of the "Hog Back" tract of land, as shown by the uncontradicted depositions of R. E. and John B. Miller; and that upon the other side there is the negative testimony of Mr. Jones, we are obliged to conclude that the bond of \$400 embraced the share of Mr. Jones in the proceeds of sale of the "Hog Back" tract, and was given in settlement of his interest in the purchase money.

It presents for decision a question in no respect involving the credibility of the parties to the controversy. Doubtless both of them have stated the facts as they believe them to be; but for the reasons stated we are of opinion that the decree appealed from is erroneous in charging the appellant with the

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payment to E. T. Jones of one-fourth of the proceeds of the resale of the "Hog Back" tract.

The decrees of the circuit court must be reversed, and the cause remanded for further proceedings, to be had therein not inconsistent with this opinion.

*Reversed.*



**Mytherville.****NORFOLK AND PORTSMOUTH TRACTION COMPANY V. FORREST'S  
ADMINISTRATRIX.**

June 10, 1909.

1. **PLEADING**—*City Ordinance—Negligence—Evidence—Street Railways.*—If a city ordinance be the basis of an action, and its violation constitutes the negligence relied on for a recovery, it should be pleaded, but where such violation is not the "ground of negligence" relied on, as where the defendant is charged with running its cars on a city street at a reckless and dangerous rate of speed, the violation of the ordinance is admissible in evidence, without being pleaded, along with other facts and circumstances tending to establish the negligence alleged in the declaration. There is no more reason why the ordinance should be pleaded than any other fact or circumstance tending to establish the negligence alleged.
2. **EVIDENCE**—*Judicial Notice—Municipal Ordinances.*—Courts do not take judicial notice of municipal ordinances, and they must be proved, but when proved they stand on the same footing as statutes.
3. **STREET RAILWAYS**—*Contributory Negligence—Last Clear Chance.*—Notwithstanding the contributory negligence of a traveler in driving upon a street car track in front of an approaching car, if the motorman of the car knew, or, in the exercise of ordinary care, ought to have known of the danger to which the plaintiff was exposed and could have avoided a collision by the exercise of ordinary care, but failed to do so, and the plaintiff was injured thereby, the street car company is liable. This is simply the doctrine of the last clear chance.
4. **NEGLECT**—*Last Clear Chance—Instructions.*—An instruction dealing with the duty of the defendant under the doctrine of the "last clear chance" is not bad for failing to state the corresponding duty of the plaintiff where this has been fully and fairly done by other instructions given in the case at the instance of the defendant.

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5. *STREET RAILWAYS—Contributory Negligence—"Small Chance" of Injury—Question for Jury.*—Whether or not it is contributory negligence for a person to attempt to cross a street railway track in front of an approaching car is determined by what a reasonably prudent person would have done under like circumstances, and is a question of fact to be determined by the jury. It cannot be said, as a matter of law, that to take a "small chance" of collision constitutes contributory negligence.
6. *TRIAL—Inferences from Conduct—Question for Jury.*—Where the evidence is conflicting it is for the jury to determine the weight to be attached to the inferences that could reasonably be drawn from the conduct of the parties.
7. *INSTRUCTIONS—Jury Fully Instructed.*—It is not error to refuse an instruction on a matter which has been fully covered by other instructions already given.

Error to a judgment of the Circuit Court of the city of Norfolk in an action of trespass on the case. Judgment for the plaintiff. Defendant assigns error.

*Affirmed.*

The opinion states the case.

*H. W. Anderson, W. H. Venable and J. R. Tucker*, for the plaintiff in error.

*Jeffries, Wolcott, Wolcott & Lankford*, for the defendant in error.

HARRISON, J., delivered the opinion of the court.

This action was brought by E. B. Forrest to recover of the Norfolk and Portsmouth Traction Company damages for personal injuries alleged to have been sustained as a result of the negligence of the defendant company in the operation of one of its street cars on Botetourt street in the city of Norfolk. The plaintiff was driving a loaded ice wagon along Pembroke avenue, and at the intersection of that avenue with Botetourt street there was a collision between the street car and the ice

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wagon, whereby the plaintiff was thrown to the ground sustaining the injuries complained of.

During the pendency of this suit the plaintiff died from the injuries he had received, and the suit was revived by his administratrix, and prosecuted in her name to a final judgment against the defendant company for \$8,000.

Whether or not, upon the trial of the case, there was any error in the rulings of the circuit court to the prejudice of the defendant company, is the subject of the present inquiry.

The first assignment of error is to the action of the court in admitting as evidence a certain ordinance of the city of Norfolk, regulating the speed of cars at street crossings, and prescribing the manner of running and controlling the same at such points. That the violation of a statute or municipal ordinance is admissible as evidence of negligence is not denied. but it is contended that for such an ordinance to be invoked "as a ground of negligence," it must not only be proven, but must be pleaded, which was not done in this case.

It may be conceded that if the ordinance be the basis of the action, and its violation constitute the negligence relied on for a recovery, it should be pleaded; but the contention here made ignores the distinction between a case in which the violation of the ordinance is the "ground of negligence" relied on, and one like that at bar where the ordinance is introduced as tending, along with other evidence, to prove the negligence which is alleged in the declaration.

The first count of the declaration alleges that the defendant negligently ran its car "at a rate of speed dangerous to persons traveling along and upon the highway at that place." This constitutes negligence, and any fact which tends to prove such allegation should go to the jury, who are to say whether or not the negligence alleged has been proved.

Persons when traveling upon and using the streets and street crossings of a city, have a right to rely upon the observance by those operating cars of an ordinance limiting the rate of speed

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at crossings, and in doing so to govern their actions accordingly. The violation of an ordinance, thus relied on, is admissible, without being pleaded, along with other facts and circumstances of the case as tending to establish the allegation that the defendant "carelessly, negligently and recklessly, ran the said car at a rate of speed dangerous to persons traveling along and upon the highway at that place."

Courts do not take judicial notice of municipal ordinances as they do of statutes, and evidence must be offered to prove them, but when proven they stand upon the same footing as statutes. *Norfolk Ry. & L. Co. v. Corletto*, 100 Va. 355, 41 S. E. 740.

In the case cited, at p. 359, it is said: "Statutes regulating the speed of railroad trains at certain places, being regulations clearly intended for the protection of travelers, it is well settled that any violation of them is competent evidence of negligence in an action brought by a traveler on the highway, even though the statute simply imposes a penalty for its violation." See *A. & D. R. Co. v. Reiger*, 95 Va. 418, 28 S. E. 590, and *South-ern Ry. Co. v. Stockdon*, 106 Va. 695, 56 S. E. 713.

In the case of *Faber v. St. Paul M. & M. Co.*, 29 Minn. 465, 467, 13 N. W. 902, where the introduction of a similar ordinance was objected to because not pleaded, it is said: "The objection cannot be sustained. The fact that the rate of speed at which the train was run was prohibited by the municipal law, was competent evidence going to prove negligence; \* \* \* and being evidence of the fact pleaded, it might be proved, although the existence of the ordinance had not been alleged in the complaint."

In *Brasington v. South Bound R. Co.*, 62 S. C. 667, 40 S. E. 667, 89 Am. St. Rep. 905, the supreme court of South Carolina says: "This is not an action to enforce the performance of any duty imposed by an ordinance of the city of Charleston, or to enforce the payment of any tax or penalty imposed by such ordinance, but the cause of action here is

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the negligence of the defendant company resulting in the death of the intestate and the ordinances of the city are only referred to as showing such negligence."

In 6 Thompson on Negligence, sec. 7868, the author says: "Where the evidence tends to show that a particular act was prohibited by ordinance and that such violation contributed to the injury, then the ordinance is quite properly admitted on the question of negligence, though not pleaded; but the rule is otherwise where the action is founded on a violation of the ordinance, and here it is necessary to plead the ordinance." See also *Lane v. Atlantic Works*, 111 Mass. 136, 140; *Union Pac. R. Co. v. Rassmussen*, 25 Neb. 810, 41 N. W. 779, 13 Am. St. Rep. 527.

In the case at bar the ordinance is not relied on as the ground of the plaintiff's right to recover. Its violation merely contributes to the proof of the fact alleged in the declaration that the defendant was running its car at a reckless and dangerous rate of speed. This being so, there is no more reason why the ordinance should be pleaded than that any other fact or circumstance adduced to establish the alleged negligence should be pleaded.

The second assignment of error is to the action of the court in giving instructions Nos. 1, 2, 3, 4 and 5, asked for by the plaintiff.

Instruction No. 1 is as follows: "The court instructs the jury that in running upon the public highway where the plaintiff's intestate, E. B. Forrest, was injured, the rights of the company's cars were not superior to those of any other vehicle, but simply equal. And said Forrest had the right to drive either across or along the track just as freely as upon any other part of the street, so long as he did not obstruct the cars, or negligently expose himself to danger. He had the right to assume that the servants of the defendant operating said car would give the proper signals and not run at an excessive rate of speed at that crossing, and he had the right to drive his wagon across or even along the track in full view of the approaching car if

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under all the circumstances it was consistent with ordinary prudence to do so. And if the jury believe from the evidence that under all the circumstances by which said Forrest was then surrounded it would have been reasonably apparent to an ordinarily prudent person that if the defendant's servants should use ordinary care in running and controlling said car, he could drive across the track without danger of a collision, then said Forrest was not guilty of negligence in driving across said tracks.

"And if the jury further believe from the evidence that under such circumstances the said servants of the defendant did not use ordinary care in operating said car in one or more of the particulars alleged in the declaration, and that as a direct and proximate result thereof the said Forrest was injured as therein alleged, they should find for the plaintiff."

The first paragraph of this instruction is conceded to be correct. The second paragraph is admittedly a sound proposition of law, but the position is taken that it is inapplicable to the facts.

This contention is not tenable. There is a conflict in the testimony with respect to the facts relied on as the basis of this instruction. The evidence of the plaintiff tends to show that the excessive speed of the car and the failure to give proper signals of its approach to the crossing were, one or both together, the proximate cause of the accident. The plaintiff's intestate, in determining the prudence of his course, had a right to rely upon the assumption that the law would be obeyed, both in respect to the speed of the car at the crossing and the sounding of the gong as it approached. If the failure to sound the gong induced the belief that the car would stop or slacken its speed and thereby led the deceased to enter a place made dangerous by a failure to slacken such speed, in obedience to the ordinance, then the failure to do these things was the proximate cause of the accident. These two paragraphs of the instruction are directed not so much to the defendant's negligence

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in failing to reduce its speed and sound its gong as to the question of Forrest's contributory negligence. They practically tell the jury that the rights of both parties upon the street were equal, and that the deceased had a right to drive upon the tracks, provided he did not obstruct the cars or negligently expose himself to danger. *Richmond Traction Co. v. Clarke*, 101 Va. 382, 388, 43 S. E. 618.

The two succeeding paragraphs told the jury what they could consider in determining whether or not the deceased did negligently expose himself to danger. That if, under all the circumstances by which the deceased was surrounded, an ordinarily prudent man would have acted as he did, then he was not negligent; that if the defendant was negligent in operating the car, and that as a direct and proximate result of such negligence the deceased was injured as alleged in the declaration, the company was liable.

The criticism that this instruction ignores the subject of the contributory negligence of the deceased and should have pointed out clearly that view of the case to the jury, is not well taken. The jury are clearly told that, in going upon the track, the deceased, in order to be free from blame, could not negligently expose himself to danger, but must be governed by the degree of caution that would be exercised by a reasonably prudent man under like circumstances. Besides, in other instructions the subject of contributory negligence of the deceased is so fully covered that when the instructions are read together it is apparent that the jury could not have been misled to the prejudice of the defendant.

Plaintiff's instruction No. 2 was as follows: "The court instructs the jury that the ordinance of the city of Norfolk introduced in evidence is a regulation intended for the protection of travelers, and any violation of it, if proven, is competent evidence of negligence in this suit, to be considered along with all the other evidence in the case in determining whether the

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defendant was guilty of negligence as charged in the declaration which caused the plaintiff's injury as therein alleged."

The objection to this instruction has been disposed of by what has been already said touching the admissibility of the ordinance as evidence.

Plaintiff's instruction No. 3 is as follows: "The court instructs the jury, that if they believe from the evidence that at the time of the accident by which the plaintiff's intestate, E. B. Forrest, was injured as shown by the evidence, there was in force an ordinance of the city of Norfolk which provided that 'it shall not be lawful for any person, or corporation, to operate or run any electric or trolley car or other vehicle propelled by electricity over or through any street crossing in the city of Norfolk, Virginia, without first reducing the rate of speed of said cars to not more than three miles per hour. And there shall be fixed to such cars a gong or other bell which shall be sounded continuously before reaching such crossing, and beginning at a distance of fifty feet from such crossing'—then the said E. B. Forrest, in approaching and crossing the defendant's track, had the right to assume that the servants of the defendant in charge of its car which was then approaching, would obey the requirements of said ordinance in the running and operating said car. And if the jury believe from the evidence that under all the circumstances by which said Forrest was surrounded, it would have been reasonably apparent to an ordinarily prudent person that he could cross the track without danger of a collision, he was not guilty of negligence in attempting to do so."

No valid objection has been made to this instruction, and it is so clearly free from objection that comment is unnecessary.

Plaintiff's instruction No. 4 is as follows: "The court instructs the jury, that if they believe from the evidence that after the servants of the defendant in charge of its car knew, or in the exercise of ordinary care ought to have known, of the danger to which the plaintiff's intestate was exposed in crossing the



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track in front of the car, they could have avoided the accident by the exercise of ordinary care, but failed to do so, and that the plaintiff was injured thereby, as alleged in the declaration. they must find for the plaintiff, whether the plaintiff's intestate was guilty of contributory negligence in attempting to cross the track at that time or not."

This is a correct statement of the doctrine of the last clear chance, and there was ample evidence to justify such an instruction. The plaintiff's evidence tends to show that when the car was 150 feet away the deceased was actually driving across the track.

It is contended that this instruction should have concluded with the words, "unless you also believe from the evidence that after the danger of collision became, or by the use of ordinary care could have been, known to the plaintiff's intestate, he could have avoided the accident and failed to do so."

This instruction was dealing with the duty of the defendant after it knew, or in the exercise of ordinary care ought to have known of the danger to which the plaintiff's intestate was exposed in crossing the track in front of the car. The view of the case which it is insisted should have been embodied in this instruction was not ignored, but was fully and clearly given to the jury by instructions "C" and "E," asked for by the defendant.

**DEFENDANT'S INSTRUCTION No. C.**

"The court instructs the jury, that if you believe from the evidence that the car of the defendant was coming south on Botetourt street approaching Pembroke avenue, and that the plaintiff's intestate was driving westwardly on Pembroke avenue, approaching Botetourt street just before the accident and that the plaintiff's intestate as he approached and entered Botetourt street, saw or by the exercise of ordinary care could have seen the car of the defendant approaching and could have

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avoided this accident, either by stopping his team, or turning to the right or left, but elected to take the chance of crossing the track on which the car was approaching at a time when he saw, or by the exercise of ordinary care could have seen, that there was danger of a collision in so doing, your verdict must be for the defendant."

## DEFENDANT'S INSTRUCTION No. E.

"The court instructs the jury, that even though you may believe from the evidence that the motorman failed to ring his bell as he approached the crossing, and that he was running at an excessive rate of speed, and that he failed to exercise ordinary care under the circumstances to avoid the accident, after he saw, or by the exercise of ordinary care could have seen that there was danger of a collision with the wagon, you still cannot find a verdict for the plaintiff, if you believe from the evidence that Forrest attempted to drive across the track in front of the approaching car, after he knew or by the exercise of ordinary care could have known that the car would not stop in time to avoid a collision with the wagon."

These two instructions fully inform the jury as to the duty resting upon the plaintiff to exercise reasonable care for his own safety and abundantly emphasizes the point sought to be engrafted upon the plaintiff's instruction No. 4. There was no more reason that the defendant's view of this phase of the case should be engrafted upon the plaintiff's instruction, than that the plaintiff's view should be embodied in each of the two instructions given, on the same subject, for the defendant. The jury were fully informed upon the doctrine of the last clear chance, in its application to both the plaintiff and defendant, and could not have been misled, to the prejudice of the defendant, by the instructions as given. *Roanoke Ry. & Elec. Co. v. Young*, 108 Va. 783, 62 S. E. 961.

The third assignment of error was to the action of the court

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in refusing to give instructions "E," "G," "H" and "I," asked for by the defendant.

We have already referred to instruction "E" and quoted it in full as given by the court. The latter part of the instruction, as asked, read as follows: "If you believe from the evidence that Forrest attempted to drive across the track in front of the approaching car, after he knew, or by the exercise of ordinary care could have known *that there was even a small chance* that the car would not stop in time to avoid a collision with the wagon."

The complaint is that before giving the instruction, the court struck out the words "that there was even a small chance." These words were properly eliminated from the instruction. They were certainly misleading, if they did not in effect take from the jury the question of the contributory negligence of the plaintiff. The law does not require a person to know that he is absolutely safe before taking a given course of action (*Newport News v. Bradford*, 99 Va. 117, 37 S. E. 807); he is only required to exercise ordinary care to avoid accident—such care as a reasonably prudent person would exercise under like circumstances. The court could not hold as a matter of law that to take a "small chance" of collision constituted contributory negligence. It was for the jury to say whether or not the risk taken was, under the circumstances, such as a person of ordinary care would or would not have assumed. It was not necessarily contributory negligence for the deceased to drive across the track in the face of "a small chance" of collision. His action depends upon what reasonably prudent persons, similarly situated, would have done. Whether or not a reasonably prudent person would have pursued the course that was taken by deceased, was a question for the jury to determine under the evidence.

Instruction "H" contained the objectionable language we have considered in connection with instruction "E," and was therefore properly refused.

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**Opinion.**

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It was not error to refuse instruction "G." It told the jury, as a matter of law, that if the motorman saw the deceased start to pull up and stop his horses, he had a right to presume that deceased would not attempt to drive across the track in front of him. The evidence is conflicting as to whether or not the deceased started to check his horses, and there are other circumstances bearing upon the question besides the mere checking of the horses. According to the motorman, both he and the deceased checked up at the same time. If this be so, then the deceased might have been misled into the belief that the motorman was stopping to let him pass. It was for the jury to determine the weight to be attached to the inferences that could reasonably be drawn from the conduct of the parties. The court properly held that the impressions likely to be made upon the motorman by the conduct of the deceased was not a matter of law for its determination, but a question to be considered by the jury in the light of all the circumstances disclosed by the evidence.

There was no error in the refusal of the court to give instruction "I," asked for by the defendant. The subject matter of that instruction had been fully covered by two other instructions—No. 5 given by the plaintiff, and instruction "F" given for the defendant.

Upon the whole case, we are of opinion that the instructions were as favorable to the defendant as it had a right to ask; that the case was fairly submitted to the jury, and that the verdict is sustained by the evidence.

The judgment must, therefore, be affirmed.

*Affirmed.*

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Statement.

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**Mytherville.**

## NORFOLK AND PORTSMOUTH TRACTION CO. v. O'NEILL.

June 10, 1909.

1. EVIDENCE—*Statement of Motorman After Accident—Credit of Motorman as Witness.*—Statements made by a motorman after an accident in reference to the circumstances attending it, are admissible to affect the credibility of the motorman's testimony in the case, though not as an admission binding his company, and the jury should be so informed as to the latter by the court.
2. STREET RAILWAYS—*Persons on Track—Warnings—Personal Injury—Contributory Negligence.*—A traveller on a city street has a right, in order to avoid an obstruction in the street, to go on or near a street railway, and, unless a motorman whose car is approaching from the rear sees that his approach is observed, it is his duty to warn the traveller of the approach of the car, and, if there is danger of running the traveller down, to slow down his car so as to avoid injuring him, if he can do so in the exercise of ordinary care; after he sees or ought to see the traveller's peril. If, in consequence of a disregard of this duty by the motorman, the traveller is injured, he may recover of the railway company, even although he was guilty of negligence in going on or near the track.
3. APPEAL AND ERROR—*Weight of Verdict in Appellate Court.*—Where the evidence is conflicting this court cannot set aside a verdict rendered thereon if there is sufficient evidence to support the verdict, although the court may be of opinion that the preponderance of the evidence is against it.

Error to a judgment of the Circuit Court of the city of Norfolk in an action of trespass on the case. Judgment for the plaintiff. Defendant assigns error.

*Affirmed.*

The opinion states the case.

## Opinion.

*H. W. Anderson, W. H. Venable and J. R. Tucker*, for the plaintiff in error.

*Jeffries, Wolcott, Wolcott & Lankford*, for the defendant in error.

BUCHANAN, J., delivered the opinion of the court.

Vivian W. O'Neill, an infant nine years of age, whilst riding on a bicycle on Olney road, in the city of Norfolk, upon which was operated a double line of street railway tracks, was injured by a street car of the Norfolk and Portsmouth Traction Company. To recover damages therefor, she instituted her action by her next friend, in which there was a verdict and judgment in her favor. To that judgment this writ of error was awarded.

The first error assigned is to the action of the court in expressing an opinion as to its understanding of what O'Brian, one of the plaintiff's witnesses had stated. Another witness was asked if he knew whether or not the car which inflicted the injury rang its gong as it approached the place of the accident. This question was objected to upon the ground that the motorman was under no obligation to ring the gong unless he saw that the plaintiff (who was riding in the same direction in which the car was moving and near the track) was going to get in front of his car; and that O'Brian had not stated, as the plaintiff claimed he had, that in going around a wagon she was so near the track as to be in danger from the car. The court in ruling upon this objection said, in substance, that it understood the witness, O'Brian, as plaintiff's counsel did; and overruled the objection, but expressly told the jury that the court's understanding of O'Brian's evidence was not to have any weight with them.

While it might have been better to have overruled the objection without expressing any opinion as to what its understanding of O'Brian's testimony was, clearly no prejudice resulted

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to the defendant from the court's action, since it plainly appears from the stenographer's notes of the evidence that O'Brian testified as the plaintiff's counsel and the court understood him. His credibility was of course for the jury, and the court expressed no opinion on that question.

Neither did the court err in permitting Dr. Woodward and Mr. Miller to testify as to a statement made by the motorman after the accident in reference to the circumstances attending it. That evidence was admitted as affecting the credibility of the motorman's testimony, and not as an admission binding his company, and the jury were so informed by the court.

The plaintiff offered three instructions, all of which were given. The defendant offered twenty-three, of which seventeen were given. The action of the court in giving those asked for by the plaintiff and in refusing to give six of those offered by the defendant is assigned as error; but the only grounds of objection to the action of the court pointed out in the petition apply to instruction No. 1 given for the plaintiff, and instructions "L" and "M" of the defendant refused by the court.

The objection made to the plaintiff's instruction No. 1 is "not as to the contents of the instruction, but the omission from it of any charge as to contributory negligence."

That instruction is as follows: "The court instructs the jury, that if they believe from the evidence that, immediately preceding the injury complained of, the plaintiff was riding upon and along Olney road, in the city of Norfolk, as alleged in the declaration, and that the defendant's car was approaching her from behind, both going in the same direction, and that by reason of a wagon standing near the curb on said street there was left a narrow space between said wagon and the street car track, and that the motorman of said car either saw, or by the exercise of ordinary care ought to have seen that the plaintiff was about to ride near to or upon the track at that place in passing said wagon, and that she would be in danger of being injured if overtaken by the car at that place, it was the duty

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of the motorman to give the plaintiff timely warning, unless he saw that his approach was observed by her, and to reduce his speed to a point sufficient to enable him to stop his car if it became necessary to avoid a collision and to continue to run at such guarded rate of speed until the plaintiff reached a place out of danger of a collision with said car, and if they believe from the evidence that the said servants of the defendant could by the exercise of ordinary care have performed their duty in this respect in time to have avoided the accident, but failed to do so, and that as a direct and proximate result of such failure the plaintiff was injured as alleged in the declaration, they must find for the plaintiff."

If the jury believed the facts hypothetically stated in that instruction, the plaintiff was entitled to recover, even if she had been guilty of negligence in going on or near to the railway track in passing around the wagon. She had the right to go upon or near the track in passing the wagon, and it was the duty of the motorman to warn her of the approach of the car, if there was danger of running her down, and to slow down his car so as to avoid injuring her if he could do so in the exercise of reasonable care after he saw or ought to have seen her peril. That is all that the instruction required of him and was plainly right. See *Richmond Traction Co. v. Clarke*, 101 Va. 382, 386-389, 43 S. E. 618, and authorities cited.

The defendant's instruction "L," rejected by the court, was as follows: "The court instructs the jury, that the defendant's car had the right of way at the point on the street at which this accident occurred, and if you believe from the evidence that he was proceeding at a lawful rate of speed, and that the plaintiff, as he approached her was riding a bicycle down the street with her bicycle under control, and far enough from the track for the car to pass her in safety, the motorman owed the plaintiff no duty to slow down or stop the car."

The defendant's instruction "M," which the court also re-



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fused to give, was substantially the same as instruction "L," as stated in the petition.

The court gave the defendant's instruction "O," which was as follows: "The court instructs the jury, that the defendant's car had the right of way at the point on the street at which this accident occurred, and if you believe from the evidence that he was proceeding at a lawful rate of speed, and that the plaintiff, as he approached her, was riding a bicycle down the street of the city with her bicycle under control and far enough from the track for the car to pass her in safety, and was not approaching a place of obvious danger of her turning in front of the car, then the motorman owed her no duty to slow down or to stop the car."

The objection made to the court's action in refusing instructions "L" and "M" is, that instruction "O" assumes that the accident occurred before the car had passed the delivery wagon standing near the track, while there was evidence tending to show that it did not occur until after the car had passed the wagon, which latter phase of the case was intended to be cured by instructions "L" and "M."

As we construe instruction "O," it does not assume at what point the accident occurred. It covers both phases of the case, and leaves the jury to determine at what point the plaintiff was injured.

The twenty instructions given in the case covered every aspect of it, and some of them two or three times, and submitted the case to the jury as favorably to the defendant as it was entitled to have it submitted.

The refusal of the court to set aside the verdict as contrary to the evidence is assigned as error.

Without discussing in detail the evidence, which is conflicting, we are of opinion that while the preponderance of evidence is in favor of the defendant's theory of the case—that the plaintiff's injury was caused by her losing control of her bicycle and falling against and under the car as it passed her—

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yet there is sufficient evidence to support the verdict of the jury, that the accident was the result of the defendant's negligence. This being so, and there being no error in the manner in which the case was submitted to the jury to the prejudice of the defendant, the judgment of the trial court, under the well settled practice, must be affirmed.

*Affirmed.*

## Mytherville.

### POTOMAC POWER COMPANY V. BURCHELL AND OTHERS.

June 10, 1909.

1. EMINENT DOMAIN—*Payment of Compensation Into Court—Vesting of Title.*—Upon payment into court of the sum ascertained to be a just compensation for land condemned for a public use, the title to the land for which compensation is allowed vests absolutely in the company in fee simple, under the provisions of section 1079 of the Code.
2. FORFEITURE—*Penalty to Secure Payment of Money—Relief in Equity Case in Judgment.*—Where land is condemned for a public use, and a written agreement is entered into between the owner and the petitioner condemning by which it is agreed that the owner shall withdraw his exceptions to the report of the commissioners, that the report shall be confirmed and the compensation fixed by the commissioners paid into court, and title shall vest in the petitioner, but that he shall pay to the owner a further sum of \$100 on or before five years from that date, and if he fails to do so within the time limited then the title acquired by the petitioner shall revert to the owner, and the report is confirmed and the compensation fixed by it is paid into court, and by the court to the land owner, but the additional \$100 is not paid within the time stipulated, the provision for the reverter of the title is a mere penalty or forfeiture to secure the payment of that sum with legal interest thereon.
3. FORFEITURES—*Penalty to Secure Payment of Money—Relief in Equity—Damages.*—A court of equity will relieve against a penalty where its object is merely to secure the payment of a fixed sum of money. The measure of damages for failure to pay money is generally the principal sum with legal interest from the time it fell due.
4. CONDITIONS SUBSEQUENT—*How Viewed.*—Where title to land has vested, any provision by which it is to be divested is regarded as a condition subsequent. Such conditions are not favored in law because they tend to destroy estates.

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Appeal from a decree of the Circuit Court of Fairfax county.  
Decree for defendants. Complainant appeals.

*Reversed.*

The opinion states the case.

*Moore, Barbour & Keith, Douglass S. Mackall*, for the appellant.

*Norton & Boothe*, for the appellees.

KEITH, P., delivered the opinion of the court.

The Potomac River Power Company, in June, 1898, gave notice that it would, on the 18th of the ensuing July, apply to the county court of Fairfax for the appointment of five disinterested freeholders, pursuant to section 1085 of the Code, to ascertain a just compensation to the owners thereof for such land as was proposed to be taken by that company for its purposes.

In accordance with this notice, five freeholders were appointed, who, acting in obedience to the order of court, returned their report, dated the 31st of October, 1898, in which they stated that they had ascertained that the sum of \$150 would be a just compensation for the land taken.

At the January term 1899, of Fairfax county court, it appearing that the Potomac Power Company had paid into court the sum of \$150, ascertained by the commissioners, the matter was referred to W. P. Moncure, a commissioner of accounts, to report as to its distribution; and it was further ordered "by consent of parties that the report of the commissioners filed herein be and the same is hereby confirmed and recorded together with the plat that accompanies it in the deed books of this county, and this matter is continued."

At the ensuing February term, the following order was entered:

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“Potomac River Power Co.

v.

N. W. Burchell, etc.

“The report of W. P. Moncure, commissioner of accounts, is now filed in this cause. No exceptions being made to same, the said report is now confirmed. And the court doth adjudge and order that out of the money in his hands the clerk do pay the costs and commissions incident to this case and the balance to pay to C. Vernon Ford, attorney for N. W. Burchell, and take his receipt for the same. And this order is final.”

There the matter rested until January, 1905, when the Potomac Power Company, the successor of the Potomac River Power Company, filed its bill, in which it shows that, on the 9th of January, 1899, it entered into a contract in writing with Norval L. Burchell, in which it was set forth and agreed that the Power Company had instituted proceedings to acquire for its purposes, by condemnation, a certain parcel of land in said county, containing three acres, more or less; that commissioners had allowed Burchell the sum of \$150 for said land; that Burchell excepted to their report; that it was finally agreed that upon the payment into court of the sum of \$150 the exceptions to the report of commissioners should be withdrawn, the court to dispose of the money as might be proper, and the report confirmed; that the title acquired by said company, however, in said condemnation proceedings should be subject to the condition that said company should pay Burchell the further sum of \$100 before using said land for its purposes or any purpose; and that such payment should be made on or before five years from the date of the agreement, and in event the payment should not be made in the time specified, then the title of said company to revert to Burchell, and the said company to convey by special warranty to Burchell the title acquired by the condemnation proceeding; but upon payment by said company to Burchell of said sum of \$100 within the

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time specified, its title to said parcel of land should become absolute and unconditional so far as Burchell and his heirs should be concerned; and Burchell was then to convey the said parcel of land to the said company, its successors and assigns, with special warranty, free of all liens and encumbrances which might be placed thereon by said Burchell. The bill further shows that Burchell died some time prior to January 9, 1904, a non-resident of the State of Virginia; that he had never made any demand on the complainant for the payment of said sum of \$100; and that up to the time of filing the bill no executor or administrator of his estate had qualified in Virginia, so that there was no one to receive the money due to him or his estate; that complainant is ready and desires to make the payment, with interest if it is proper; that Burchell left surviving him his widow and several children, his heirs at law; that complainant was willing to have waived, though it did not do so, the legal requirement that the \$100 should be paid to the personal representative of Burchell, and was willing to make payment to the widow and heirs at law, and take a deed from them, but was afterwards advised that Edward Burchell, one of the children, was *non compos mentis*; that no deed had ever been tendered to complainant in accordance with the agreement; and complainant prays that the cloud resting upon its title by reason of the provisions of the agreement of the 9th of January, 1899, between the Potomac Power Company and Burchell, be quieted, and that complainant may have such other relief as his case requires.

The defendants answered this bill at length. They admit that Burchell was at the time he entered into said agreement and at the time of his death, which occurred in January, 1899, a non-resident of the State of Virginia, and that so far as they are informed he never made any demand upon the complainant, and that no executor on the estate of Burchell had ever qualified in Virginia. They deny that there was any obligation upon Burchell or upon his executor to make any demand upon

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the Potomac Power Company for the payment of the sum of money in question, and further aver that at all times within the five years mentioned in the agreement, Landon Burchell, who acted for his father in the preparation of said agreement, and who is the executor and trustee under his will, resided in the city of Washington, and was prepared and authorized to accept the money in controversy, if there had been any desire upon the part of the Power Company to make payment of it.

That Burchell, at the time the commissioners reported and fixed the compensation at the sum of \$150, had promptly excepted, upon the ground that the amount allowed was totally inadequate, and that he was preparing to show that said parcel of land, on account of its peculiar location, was of value largely in excess of the sum fixed by the commissioners; that after Burchell had filed his exceptions, in order to avoid protracted and costly litigation, an agreement was reached between the Power Company and Burchell, a copy of which is filed with plaintiff's bill. The answer states the defendants' view of the negotiations which led up to the contract filed with the bill at great length, the substance of it being that the sum of \$100 provided for in the contract was not considered by Burchell as representing the value of the property, which it is claimed was and is greatly in excess of said sum, but that the real purpose and intention of said agreement was to give to the Power Company an option during the period of five years, by force of which, upon the payment of \$100 within the time limited, the title of Burchell to the three acres of land was to be divested, and the deed was then to be made by Burchell conveying it with special warranty to the Potomac Power Company.

A good deal of evidence was taken in support of this view, which resulted in the decree of the circuit court of Fairfax by virtue of which a commissioner was appointed with instructions to convey to Landon Burchell, to be held by him in trust in accordance with the terms of the will of Norval W. Burchell, all the right, title and interest acquired by complainant and

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those under whom it claims under the condemnation proceeding, in accordance with the agreement of January 9, 1899; and from that decree an appeal was allowed by this court.

Reference is made in the record to the source of Burchell's title as having been founded upon a sale for delinquent taxes assessed against the Chesapeake and Ohio Canal Company, which had at one time owned the land in controversy; but we have not thought it necessary to discuss that question, as that corporation is not named as a defendant in the bill, and is taking no part in this litigation. We have set forth in detail the condemnation proceeding in the county court of Fairfax, for upon the legal effect of that proceeding this controversy rests.

By section 1079 of the Code of 1887, it is provided that "the sum so ascertained to be a just compensation may be paid to the person entitled or into court. \* \* \* Upon such payment the title to \* \* \* the land for which said compensation is allowed shall be absolutely vested in the company in fee simple."

In *Southern Ry. Co. v. Gregg*, 101 Va. 308, 43 S. E. 570, it is said: "The payment of the fund into court was a condition precedent to the vesting of the title, and as soon as it was paid the title did vest absolutely."

It appears from the condemnation proceeding in this case, that the money was paid into court, and that the report of the commissioners was confirmed by consent of the parties; and not only that, but it further appears that the sum ascertained by the commissioners was by order of the court paid to the attorney of N. W. Burchell, the owner of the land taken. Whatever title Burchell had, by force of this proceeding, vested in the Potomac Power Company in fee simple.

The contract of January 9, 1899, is in writing; it is plain and unambiguous; and is within the direct terms of the rule which forbids us to receive parol evidence to vary or contradict a written instrument. *Towner v. Lucas*, 13 Gratt. 705; *Slaughter v. Smither*, 97 Va. 202, 33 S. E. 544.



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The contract recites: "Whereas, the commissioners appointed by said court to ascertain a just compensation to be paid the owner or owners of said land, duly and regularly made their report to said court and therein and thereby assessed and fixed the amount to be paid by said company for said land at \$150.00, and

"Whereas, the said N. W. Burchell, claiming to be the owner of said land, is dissatisfied with the amount so allowed and has filed exceptions thereto and has agreed in consideration of this agreement to withdraw his said exceptions and consents to the confirmation of the said report;

"Now, therefore, this agreement witnesseth, that the parties hereto have agreed and do hereby covenant and agree to and with each other as follows:

"First. That upon the payment of said sum of one hundred and fifty dollars into said court, such payment shall be considered as a complete satisfaction and answer to all objections and exceptions to said report, and thereupon the said report to be confirmed by a consent order vesting in said party of the second part title to said land, the said sum of \$150.00 to be disposed of by the court as it may determine right and proper.

"Second. That the title so to be acquired by the said party of the second part as aforesaid shall be subject to this condition; that the party of the second part shall pay to the said Burchell the further sum of one hundred dollars before using said land for its purposes or any purpose, provided that such payment of said additional one hundred dollars shall be made on or before five years from this date, and in the event the said party of the second part shall fail to make such further payment of one hundred dollars within the time aforesaid, then and in such event, all title acquired by party of the second part to said land as aforesaid shall revert to said Burchell, and the party of the second part shall and will convey unto the said Burchell, with special warranty, all the right, title and interest acquired by it under said condemnation proceedings."

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This contract recognizes in explicit terms the force and effect given to condemnation proceedings by section 1079 of the Code of 1887 upon the title to land where the terms of the statute have been complied with, and if any added force could be given to the statute by agreement of parties it is to be found in the terms of this contract, which declares that the payment of \$150 into court should be considered as a complete satisfaction and answer to all objections, and that thereupon the report was to be confirmed by a consent order vesting in the party of the second part title to the land. The title having vested, any provision or stipulation in that contract by which the title was to be divested is to be regarded as a condition subsequent.

A condition subsequent is one which is to be performed or fulfilled after the vesting of the estate, and the intent of which is to defeat it. 2 Minor, 266. And it is well settled that conditions subsequent are not favored in law, because they tend to destroy estates. *Peoples' Pleasure Park Co. v. Rohleder*, ante, p. 439, 61 S. E. 794.

The contract having already provided that upon the payment of the money awarded by the commissioners into court it should be considered as a complete satisfaction and answer to all objections on the part of Burchell, and that the report was to be confirmed and the title to the land vested in the Power Company, it was then provided that before using the land for its purposes or any purpose the Power Company should pay to Burchell the further sum of \$100 within five years from the date of the agreement, and that if it failed to make such further payment within the time aforesaid, the title of the Power Company should revert to Burchell.

In the contemplation of a court of equity, the provision that upon the failure to pay the specified sum within the time limited, the title should revert to Burchell, is a penalty or forfeiture, the object of which is to secure the payment of money, against which a court of equity will relieve.

"The general principle now adopted is that whenever a

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penalty is inserted merely to secure the performance or enjoyment of a collateral object, the latter is considered as the principal intent of the instrument, and the penalty is deemed only as accessory and therefore as intended only to secure the due performance or the damage really incurred by the non-performance. In every such case, the true test by which to ascertain whether relief can be had in equity is to consider whether compensation can be made or not. If it cannot be made, then courts of equity will not interfere. If it can be made, then if the penalty is to secure the mere payment of money, courts of equity will relieve the party upon paying the principal and interest." 2 Story's Eq. Jur. sec. 1314.

In *Hackett v. Alcock*, 1 Call 533, it is said: "A court of equity will always relieve against a penalty, where compensation can be made."

In *Nelson v. Carrington*, 4 Munf. 332, it is said: "Equity is not fond of taking advantage of forfeitures arising merely from a lapse of the time specified; and it is the constant course of courts of equity to relieve against such forfeitures on making adequate compensation."

In the case of *Asher v. Pendleton*, 6 Gratt. 628, Pendleton and Asher had purchased a tract of land at public auction jointly upon credit and under a written contract between them, which provided that if Pendleton failed to pay all or any portion of his share of the purchase money so that Asher had to pay it, Asher should have the whole land, and repay to Pendleton any portion of the purchase money he had paid. Pendleton failed to pay and Asher paid in full. It was held by the court that this provision was a penalty against which a court of equity would relieve.

The condition upon which a court of equity grants relief against a forfeiture or penalty is that compensation for non-performance can be made; and in this case it is easy of ascertainment. The stipulation not performed was for the payment of \$100 in cash on or before a given day in January, 1907. The

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money was not paid, and as was said by this court in *Bethel v. Salem Imp. Co.*, 93 Va. 354, 25 S. E. 304, 57 Am. St. Rep. 808, 33 L. R. A. 602, "the measure of damages for a failure to pay money is, with few exceptions, the principal sum with legal interest thereon from the time the payment was due."

In *Selden v. Camp*, 95 Va. 527, 28 S. E. 877, Judge Harrison, speaking for the court, says: "Mere default in the payment of money at a stipulated time generally admits of compensation, and hence the time of payment is rarely of the essence of the contract, and when time is not of the essence of the contract, and compensation can be made, courts of equity can grant relief even against the failure to perform punctually conditions precedent."

We have then this case: By force of the condemnation proceeding in the county court of Fairfax, the title to the land involved in this litigation was vested in the Potomac Power Company. The contract of January 9, 1899, between Burchell and the Potomac Power Company is fully set out in the writing filed as an exhibit with the bill. There is no suggestion of any fraud, accident or mistake with respect to the terms of this contract; and, being plain and unambiguous, it is within the rule which excludes parol evidence to vary or contradict a written instrument. The stipulation contained in the contract with respect to the payment of \$100 within five years, and, in the event that it was not paid within that time, that the title which had vested in the Power Company should revert to Burchell, is a penalty or forfeiture, the non-performance of which admits of compensation, and against which a court of equity will relieve.

From all of which it follows, that the decree of the circuit court of Fairfax must be reversed, and the cause remanded for further proceedings in accordance with this opinion.

*Reversed.*

## Opinion.

**Mytherville.**

## RANDALL AND OTHERS V. HARRISON'S EXECUTOR AND OTHERS.

June 10, 1909.

Absent, Harrison, J.

1. ESTATES—*Gift of Life Estate—Power Over Fee—Gift Over of What "May be Left."*—A gift of a life estate, with power to the donee to use any and all of principal, vests in the first taker a fee simple in the lands, and an absolute estate in the personal property so given, and a gift over of "what may be left" is void.

Appeal from a decree of the Circuit Court of Cumberland county. The decree appealed from was not adverse to the complainant, but was in favor of one defendant as against other defendants, and the latter appeal.

*Affirmed.*

*Willis B. Smith* and *R. T. W. Duke, Jr.*, for the appellants.

*Wm. H. Mann, Christian, Gordon & Christian, B. B. Woodson* and *Wm. M. Smith*, for the appellees.

WHITTLE, J., delivered the opinion of the court.

This appeal involves the construction of the following clause of the will of Randolph Harrison, deceased:

"I give and bequeathe to my dear wife, Harriet H. Harrison, for and during her natural life, all my estate real and personal that may be left after paying my just debts. And as I know the unstable and fluctuating value of real estate in Virginia and the difficulty of selling landed property at anything like a fair valuation, and that there may be yet a further shrinkage,

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so that there may not be enough left from the proceeds after paying my debts and defraying all charges to give her, the said Harriet H. Harrison, a decent maintenance from the interest in such residue (if it should be necessary to sell all my property); and as I deply regret having induced my wife to relinquish her right of dower to secure a debt of six thousand dollars (\$6,000.00) due Messrs. Wyman and Byrd, I hereby empower her, my wife before named, to use any and all of the principal, as well as the interest of the amount that may be left as above stated after settling up my estate, but it is my wish and injunction, which I know will be faithfully carried out by my dear wife, that the principal of any amount left from my estate be drawn upon only to supply her own necessities. I hold that property should revert to the source whence it came; accordingly it is my desire that anything that may be left after the death of my wife should be divided amongst my brothers and sister J. N. Harrison, and the children of my brother B. H. Harrison, *per stirpes*."

The circuit court decreed that, subject to the debts of the testator, his widow took a fee-simple estate in the lands and an absolute estate in the personal property whereof he died seized and possessed.

The principle here involved has been so repeatedly decided by this court that we feel that further discussion of it can serve no good purpose. The case is ruled, and the decree of the circuit court sustained, by a long line of decisions of which *May v. Joynes*, 20 Gratt. 692; *Farish v. Wayman*, 91 Va. 430, 21 S. E. 810; *Robertson v. Hardy's Admr.*, 2 Va. Dec. 275, 23 S. E. 766; *Brown v. Strother*, 102 Va. 145, 47 S. E. 236; *Hawley v. Watkins*, *ante*, p. 122, 63 S. E. 560, 2 Va. App. 819; *Rolley v. Rolley*, *ante*, p. 449, 63 S. E. 560, and *Hunter v. Hicks*, *ante*, p. 615, 64 S. E. 988, 3 Va. App. 147, are illustrations.

The decree appealed from follows these precedents and must be affirmed.

*Affirmed.*

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Syllabus.

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**Mythreville.****RIVERSIDE RESIDENCE COMPANY (INC.) v. HUSTED.**

June 10, 1909.

1. **VENDOR AND PURCHASER—*Changed Conditions—Disaffirming Contract—Action for Purchase Money.***—Where no possession of land was ever delivered by the vendor to the vendee, and the vendor has placed himself, or permitted himself to be placed, in such a position, without fault on the part of the vendee, that he cannot deliver the land sold in substantially the condition it was when the contract of purchase was entered into, he is really in no better condition than if the title to the property sold was bad; and a vendee who has paid a part, or the whole, of the purchase price, may elect to disaffirm the contract, and sue at law and recover the purchase money paid by him.
2. **PLEADING—*Assumpsit—Payments for Land—Failure of Consideration.***—A count in a declaration in assumpsit to recover payments made on the purchase price of a tract of land that avers a state of facts which, if true, shows that the plaintiff never received anything under the contract of sale, and that the defendant cannot convey what he contracted to convey, sufficiently avers a substantial, if not a total failure of consideration, and is a good count.
3. **VENDOR AND PURCHASER—*Sale on Installments—Action to Recover Payments.***—Where land has been sold to be paid for in installments, and the deed is not to be made until the last installment is paid, and a change in the condition of the land has been made or permitted by the vendor who still has possession, without the knowledge of the vendee, the vendor has until the last installment falls due to restore the land to substantially its original condition, if it can be so restored, and no action can be maintained by the vendee before that time to recover installments paid.
4. **INSTRUCTIONS—*Different Theories of Case—Verdicts.***—Where there is evidence, tending to support the contention of the plaintiff as well as that of the defendant, and it is sufficient to support a

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verdict, it is proper to instruct the jury on each theory of the case, and a verdict for either party cannot be set aside as contrary to the evidence.

Error to a judgment of the Court of Law and Chancery of the city of Norfolk in an action of *assumpsit*. Judgment for the plaintiff. Defendant assigns error.

*Affirmed.*

The opinion states the case.

*R. Randolph Hicks*, for the plaintiff in error.

*Tazewell Taylor*, for the defendant in error.

BUCHANAN, J., delivered the opinion of the court.

The plaintiff in error, which was the defendant in the trial court, entered into an agreement with the defendant in error by which it sold and undertook to convey to her lots Nos. 6 and 7, in block No. 1, as laid out on map of the defendant company of record in the clerk's office of the Circuit Court of Norfolk county, for the price of fifteen hundred dollars, \$100 to be paid in cash, and monthly installments of \$37.50 thereafter until the whole sum of \$1,500 was paid, at which time the defendant company was to convey the lots in fee simple, free from all liens, to the plaintiff. The latter paid the cash payment and monthly installments until she had paid the sum of \$587.50, but possession was never delivered to her. After the making of the agreement, the defendant, according to the allegations in the first count in the declaration, permitted, without the knowledge of the plaintiff, a race-track corporation to enter upon and remove the soil from the greater part of the lots, the excavation varying in depth from a few inches to six feet, and, as the plaintiff claims, destroyed their value for the erection of buildings thereon, the purpose for which she purchased the lots.

When the plaintiff ascertained the condition of the lots by



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reason of the said excavation and removal, and that the defendant could not convey to her, as she claims, what she had agreed to purchase, she instituted her action of *assumpsit* to recover from the defendant what she had paid on the lots, with interest. There was a verdict and judgment in her favor for the amount claimed, and to that judgment this writ of error was awarded.

The first error assigned is to the action of the court in overruling the demurrer to the special count in the declaration.

The ground of that objection is that the count does not aver that the consideration of the contract wholly failed.

The agreement, in substance so far as it is material to the questions involved in this case, is substantially set out in the count, and the amount she had paid on the purchase price. It then avers that since the making of the contract "the said defendant in disregard of the rights of the plaintiff, has permitted and allowed certain other people, to-wit, Boulevard Land Corporation and Jamestown Jockey Club, Inc., to enter in and upon said lots which the said defendant had contracted to sell to said plaintiff, and to excavate and carry off the soil thereof to the great detriment and damage of said property. as a result whereof said property is largely destroyed so far as the uses for which it was generally intended and for which it was specially intended by this plaintiff in purchasing the same; that said property, at the time of said purchase, was particularly adapted for residential purposes owing to the fact that the same was located upon the Elizabeth river, and the high character of the land constituting the same made it especially valuable and attractive, and this was the prime motive actuating the plaintiff in purchasing the same. By reason of the premises the value of said property has been greatly depreciated and destroyed and especially is this so; so far as this plaintiff is concerned; that said acts were committed without her knowledge, sanction or consent, she never having been let into possession of said property, and she has been making payments on

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said purchase in ignorance of the same. She further avers that it is impossible to restore the land to its original condition so as to adapt it to the uses for which she intended it, and that therefore there is a failure of consideration so far as said land is concerned."

A purchaser who buys real property, as was said in *Newberry v. Ruffin*, 102 Va. 73, 78, 45 S. E. 733, 734, "the title to which is bad, may choose between a variety of remedies for his relief, and by the remedy chosen he elects to affirm or disaffirm the contract. A court of law cannot rescind the contract, but a vendee may abandon the possession of the premises and set up the want of title as a defense when sued for the purchase money; or if he has paid a part or the whole of the purchase money, he may sue in a court of law and recover it back, having in the meanwhile abandoned the premises or restored them to the vendor; or he may file his bill in equity on failure of the title, praying that the contract be in terms rescinded."

Where, as in this case, no possession was ever delivered and the vendor has placed himself in a position, or has permitted himself to be placed in the position, without fault on the part of the vendee, that he cannot deliver the land sold in substantially the condition it was when the contract of purchase was entered into, he is really in no better condition than if the title to the property sold was bad, and it would seem to be clear that the vendee, who has paid a part or the whole of the purchase price, may elect to disaffirm the contract and sue at law and recover the purchase money paid by him.

It is said in 24 Am. & Eng. Enc. Law (2nd ed.), 644-5, that "a total or substantial failure of the consideration in reliance upon which a party has entered into a contract, constitutes ground for him to abandon the contract, or treat it as rescinded. This ground of rescission or abandonment is strongly analogous to the non-performance, and it is obvious that the two may frequently be identical. \* \* \* When a party wishes to rescind a contract on the ground of failure of consideration, if

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the failure has been partial only and a subsisting executed part performance is in his hands, and there has been no fraud on the part of the other, rescission will not be allowed." See *Beetem v. Burkholder*, 69 Penn. St. 249; *Johnson v. Jennings*, 10 Gratt. 4, 60 Am. Dec. 323; *Buena Vista Co. v. McCandlish, &c.*, 92 Va. 297, 23 S. E. 781.

The special count in the declaration, as we understand and construe it, avers a state of facts which, if true, shows that the plaintiff has never received anything under the contract of sale; that the defendant cannot convey what he agreed to convey; and that there is, therefore, a substantial if not a total failure of consideration. The demurrer to that count was, therefore, properly overruled by the court.

The next assignment of error is to the action of the court in giving the instruction asked for by the plaintiff.

The instruction objected to is as follows: "The court instructs the jury, that if they believe from the evidence that the plaintiff cannot get the lots in substantially the physical condition in which they were when she contracted for same, that then and in that event she cannot be made to take the same against her objection, and is entitled to the return to her, with interest, of so much money as she paid on said contract."

The court also gave the following instruction for the defendant: "The court instructs the jury, that the plaintiff in this cause cannot recover unless the consideration of the contract shown in evidence wholly failed. If the jury believe from the evidence that the defendant agreed to sell to the plaintiff lots Nos. 6 and 7, in block 1, in the declaration mentioned, to be paid for in installments, and that deed to the property was not to be delivered until all of the installments are paid, then the defendant has until the last installment falls due to restore said lots to substantially their original condition, if the same can be so restored, and if from the evidence the jury believe that said lots can be so restored, the plaintiff cannot recover."

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These instructions, the only instructions given, presented the respective contentions of the parties. There was no controversy as to the fact that there had been an excavation and removal of the surface of the lots, and that their physical condition had been materially changed. The only question really was whether or not the lots could be restored substantially to the condition they were in when the agreement to sell and purchase was made. That question was submitted to the jury as favorably to the defendant as it was entitled to have it submitted. There was evidence tending to sustain the contentions of each party, and sufficient, if the jury believed it, to support a finding either way—certainly to sustain a finding in favor of the plaintiff.

We are of opinion, therefore, that the court did not err to the prejudice of the defendant in instructing the jury; and we are further of opinion that it did not err in refusing to set aside the verdict in favor of plaintiff and grant a new trial.

The judgment complained of must be affirmed.

*Affirmed.*

## Opinion.

**Mytherville.**

## SAVAGE V. CAUTHORN AND OTHERS.

June 10, 1909.

1. **APPEAL AND ERROR—Bills of Exception—Signature of Judge—Part of Record.**—Where a bill of exception, certifying the evidence, is signed and sealed by the presiding judge at the end of the formal part of the bill, and immediately following it there is a statement of "all the facts proven on the trial of this case," which is likewise signed and sealed by the judge, and it unmistakably appears that both were made up and signed by the judge at the same time, in open court, this is a sufficient incorporation of such facts into the record.
2. **VENDOR AND PURCHASER—Loss of Land—Recovery of Purchase Money—Cloud on Title—Case in Judgment.**—A purchaser of land with full notice of a prior deed of trust to secure money, bought the land for part cash and the residue on time, accepted a deed with covenants of general warranty and against encumbrances, and gave back a deed of trust to secure the deferred payments, and the trustee and the beneficiary and her husband agreed to apply the cash payment to the payment of the prior deed of trust debt, but failed to do so. Subsequently, the husband agreed to refund the cash payment and take back the land, but this was not done. The purchaser was informed that the amount due under the prior deed of trust was much less than his last bond, and could be paid out of its proceeds, but he declined to agree to this, or to pay the instalment then due, and the land was afterwards sold for default in payment of the deferred payments and brought only enough to pay them. The purchaser at the trustee's sale brought ejectment against the former purchaser and turned him out, and this action was brought by the latter against the trustee, and the beneficiary and her husband above mentioned, to recover back the cash payment made on the land and damages for the "trouble, costs and damages in moving away."

*Held:* The purchaser could have paid the amount due on the former deed of trust and had the same credited on the amount due by

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him, or could have enjoined the sale until the prior debt was paid or so much of what he owed as was necessary was set apart for that purpose. Not having done this he cannot maintain the present action. The beneficiary is not liable, as the purchaser did not pay the prior lien, and the land brought no surplus, and he was not evicted by title paramount, and the trustee and husband are not liable as there was no consideration for their promise.

Error to a judgment of the Circuit Court of Mathews county in an action of *assumpsit*. Judgment for the defendants. Plaintiff assigns error.

*Affirmed.*

The opinion states the case.

*J. N. Stubbs*, for the plaintiff in error.

*J. Royd Sears and Garnett & Pollard*, for the defendant in error.

CARDWELL, J., delivered the opinion of the court.

At the threshold of this case we are asked to consider whether or not the facts proven on the trial in the circuit court have been properly incorporated into the record before us.

The action is trespass on the case in *assumpsit*, and upon issue joined in the circuit court both parties agreed to waive the intervention of a jury and to submit the case, both as to the law and the facts to the court for decision, and the court rendered its judgment for the defendants. Whereupon the plaintiff moved the court to set aside its judgment and award a new trial, which motion was overruled, and to this ruling plaintiff excepted; and here follows the judgment of the court and the only bill of exceptions taken and made a part of the record:

"And now at this day, to-wit, at a circuit court continued and held for the county of Mathews at the court house thereof on Thursday, the 21st day of May, 1908, it being the same

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day and year as that first herein mentioned, the following order was entered:

"Mary J. Savage

v.

"L. E. Cauthorn and others.

"The court having maturely considered the motion made by the plaintiff on the 21st day of November, 1907, to set aside the judgment entered against her on the 19th day of November, 1907, and grant her a new trial, doth overrule said motion.

"Memorandum.—To the opinion of the court in refusing to set aside the said judgment and grant the plaintiff a new trial the plaintiff, by her attorney, tendered the following bill of exception and the facts proven during the trial of said case, which she prayed might be received, signed and sealed by the court and made a part of the record, which is accordingly done.

"EXCEPTIONS FILED BY PLAINTIFF.

"Mary Jane Savage

v.

"G. T. Cauthorn, L. E. Cauthorn and E. M. Maxwell.

"Be it remembered that after both plaintiff and defendants had waived a jury and consented for the court to hear the case, and after all the evidence had been heard and argument of counsel, the court entered the following judgment: 'It is considered by the court that the plaintiff take nothing by her declaration, but for her false clamor be in mercy, &c., and that the defendants go thereof without day and recover against the plaintiff their costs by them about their defense in this behalf expended.' The plaintiff then moved the court to set aside the said judgment and grant her a new trial, as being contrary to the law and the evidence. After argument, the court refused to set aside the

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judgment and grant the plaintiff a new trial. To the opinion of the court refusing to grant a new trial, the plaintiff excepts and tenders this her bill of exception, which she prays may be signed, sealed and enrolled and made a part of the record in this case, which is accordingly done.

"Given under my hand and seal this 21st day of May, 1908.

"CLAGGETT B. JONES. (Seal.)"

Immediately following the foregoing we find this statement: "Here follows all the facts proven on the trial of this case." Then is inserted the statement of facts, containing deeds and acknowledgments, etc., and at the end thereof is found: "Given under my hand and seal this 21st day of May, 1908. (Signed) "Claggett B. Jones, (Seal)."

Now, if the presiding judge had withheld his signature, and only affixed it at the end of the statement of the facts proved at the trial, which immediately follows the judgment of the court on the motion for a new trial and the bill of exception to that ruling, it would hardly have been questioned that the statement of the facts proved, as well as the judgment and the exception thereto, would have become a part of the record. The judgment, the bill of exception, and the statement of the facts proved are all of the same date, and unmistakably were made up and signed by the judge at the same time, in open court, and certified by the clerk.

The case of *U. S. Mineral Co. v. Camden & Driscoll*, 106 Va. 663, 56 S. E. 561, 117 Am. St. Rep. 1028, so much relied on by the defendants, is distinguishable from this case. In the first case, as the opinion states, the statement purporting to be the evidence could not be identified as a part of the record as there was nothing to show how and when it got among the papers of the case. There the statement of the evidence was without date, and there was nothing whatever about it to show when or how it was made up or got into the record; while in this case



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the judgment of the court, the exception to the refusal of a new trial and the statement of the facts proved are all embodied in the record on the same date, and, had the signature of the presiding judge been affixed only at the end of the record thus made, it could not have been questioned that the facts proved, as well as the exception to the court's ruling on the motion for a new trial, would have been incorporated into and become a part of the record, properly to be considered upon this writ of error.

The case is simply this, the presiding judge signed the bill of exception taken to the ruling on the motion for a new trial, and identified the facts proved immediately following the statement of the exception, in two places when his signature as affixed at the end of the bill and statement of the facts would have been sufficient; and it would be an extremely technical ruling to hold that the signing by the judge of the bill of exception and statement of the facts, made up at one and the same time, in two places instead of at the end of the record thus made, excludes from the record the statement of the facts proved and certified. There is not the slightest difficulty in determining "how and when this statement got among the papers in this case," and there is no authority to which we have been cited or have found for our refusing to consider it as a part of the record.

Upon its merits, the case is as follows: On the 1st day of July, 1905, L. E. Cauthorn and her husband, G. T. Cauthorn, in consideration of the sum of \$1,500, \$650 paid in cash and the balance secured, conveyed with general warranty of title to Mary Jane Savage, plaintiff in error, two certain parcels of land, aggregating about 16 acres, situated in Mathews county; and upon the same day plaintiff in error re-conveyed the land to one E. M. Maxwell, in trust, to secure the payment of the two notes of \$450, each executed by plaintiff in error to Mrs. L. E. Cauthorn, for unpaid purchase money, and payable respectively at six and twelve months from their date, with interest. At the time of the execution and recordation of these

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deeds, there was of record in the clerk's office of Mathews county a deed of trust of prior date, and of which plaintiff in error had actual as well as constructive notice; executed by defendants in error, L. E. Cauthorn and her husband, conveying the same parcels of land to one Sands Smith, in trust to secure two bonds of L. E. and G. T. Cauthorn, executed to and held by Levin H. Miller, in the sum of \$500 each with interest.

It is alleged that when plaintiff in error, on July 1, 1905, paid the \$450 on her purchase of the 16 acres of land, the Cauthorns and Maxwell, trustee, promised that this money and the \$200 paid by plaintiff in error on November 14, 1904, should be used in paying off the debt secured on the land by the said deed to Sands Smith, trustee, but this was not done, and when plaintiff in error's note for \$450, given for the first deferred payment on the land she had bought of the Cauthorns fell due, she declined to pay it on the ground that the debt secured by the deed to Sands Smith, trustee, had not been paid.

In February, 1906, plaintiff in error went to the house of G. T. Cauthorn, and then and there it is alleged the latter agreed that he would return to the former the \$650 she had paid and take back the land conveyed to her July 1, 1905; but this was not done, and on July 1, 1906, Maxwell, trustee, advertised the land for sale under the trust deed given by plaintiff in error, and sold the same to defendant in error, L. E. Cauthorn, on August 3, 1906, and made her a deed therefor, the purchase price of the land at this sale being the amount of the two purchase money notes given by plaintiff in error, due and to become due as above stated.

After the deed from Maxwell, trustee, conveying the land to defendant in error, L. E. Cauthorn, had been executed the latter instituted against plaintiff in error an action of ejectment in the circuit court of Mathews county, and a judgment was rendered in that action against plaintiff in error, and she was ejected from the premises.

It further appears, that before the sale made by Maxwell,

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trustee, to L. E. Cauthorn, Maxwell told plaintiff in error that there was only due on the deed to Sands Smith, trustee, a little more than \$190, and this amount could be paid out of the last payment to become due from plaintiff in error and she would be protected; but as it seems she declined to agree to this, and the sale by Maxwell, trustee, of the land followed.

In this action, brought in December, 1906, plaintiff in error sought to recover of defendants in error, L. E. Cauthorn and G. T. Cauthorn, and Maxwell, trustee, the \$650 paid on her purchase of the 16 acres of land, and damages for "much trouble and cost and damages in moving away," which she estimated at not less than \$150. The declaration rests the right of recovery solely upon a breach of the promises made by G. T. Cauthorn and Maxwell, trustee, to apply the \$200 and \$450, paid by plaintiff in error on the purchase from L. E. Cauthorn, to the discharge of the debt secured by the deed to Sands Smith, trustee; and besides the failure to show the alleged breach, plainly the action could not be maintained against G. T. Cauthorn or Maxwell, trustee, for the want of a consideration for the promise claimed to have been broken, as L. E. Cauthorn was the sole owner of the land sold and conveyed to plaintiff in error.

Moreover, upon the facts of the case, there was no time prior to the sale by Maxwell, trustee, when plaintiff in error could not have protected herself against the loss she is in this action seeking to recover, as there was only due on the Miller debt, secured by the deed to Sands Smith, trustee, a balance of about \$190, and the purchase money due and to become due from her amounted to a much larger sum; so that she might have, upon a bill in equity, enjoined a sale by Maxwell, trustee, until the Miller debt was paid, or so much of what she owed on her purchase of the land set apart for that purpose. But instead of this course, she permitted the land to be sold, and unfortunately for her, it only brought enough to pay the balance of the purchase money unquestionably due to Mrs. L. E. Cauthorne. In fact plaintiff in error might have paid the \$190 due on the

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Miller debt, and required the amount to be credited on her unpaid purchase money, a right that a court of equity would have had jurisdiction to enforce.

The fact that both L. E. Cauthorn and her husband signed the option taken by the plaintiff in error to purchase the land avails the latter nothing as the dealings between the parties culminated in the deed of conveyance to plaintiff in error and her deed to secure the deferred payments of the purchase money for the land. Nor could the covenants in her deed avail her as she has not been evicted by a paramount title. Nor could the alleged promises of G. T. Cauthorn and Maxwell, trustee, avail plaintiff in error since no consideration for these promises is either alleged or proved.

We are of opinion that the judgment of the circuit court complained of is right, and it is, therefore, affirmed.

*Affirmed.*

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Opinion.

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### Mytherville.

#### SCHNURMAN'S EXECUTRIX v. BIDDLE & COMPANY.

June 10, 1909.

Absent, Cardwell, J.

1. EXECUTORS AND ADMINISTRATORS—*Security of Executors—When Required—Discretion of Court.*—Under the provisions of section 2642 of the Code, courts of probate are clothed with a wide discretion in the matter of requiring security of executors where the will directs that none shall be given, and the exercise of it should not be disturbed except in a case of plain abuse. It may be required on the application of any person interested, or where the court, of its own knowledge, thinks it ought to be required.
2. EXECUTORS AND ADMINISTRATORS—*Security of Executors—Application by Creditors of Bankrupt.*—An application to require security of the executrix of one who was, in his lifetime, declared a bankrupt, but whose estate has not been discharged, may be made by creditors of the bankrupt. It is not a proceeding to recover property of the bankrupt which can be only brought by the trustee of the bankrupt, but an application to require security for the safety of a fund in which the creditors deem themselves interested.

Error to a judgment of the Chancery Court of the city of Richmond on an application to require security of an executrix. Judgment for the applicants. The executrix assigns error.

*Affirmed.*

The opinion states the case.

*O'Flaherty & Fulton*, for the plaintiff in error.

*Stern & Stern*, for the defendant in error.

## Opinion.

KEITH, P., delivered the opinion of the court.

Schnurman was adjudicated a bankrupt at Richmond, November 9, 1907. The appellees, Biddle & Company and others were named by him in his schedules as his creditors, and proved their debts. He never applied during his lifetime for his discharge in bankruptcy, and died April 10, 1908, leaving a will in which his wife was named as executrix, and requesting that no security be required of her on her bond as such. She qualified in the Chancery Court of the city of Richmond, on April 17, 1908, giving a bond without security in the penalty of \$8,000. On May 25, 1908, the appellees moved the court to require the executrix to give security, and the court entered an order that on June 1st she should execute a bond in the penalty of \$2,500, with security.

The executrix denied the right of the creditors, Biddle & Co. and others, to move the court for security on her bond as executrix, it being admitted that they were creditors of Henry Schnurman; deceased, on debts arising prior to the filing of the petition in bankruptcy by her testator. She further proved that Henry Schnurman filed his petition in bankruptcy in the United States Court for the Eastern District of Virginia; that with this petition he filed all schedules required by law, and among them the schedule showing all the assets and estate of the bankrupt, and the names and addresses of all of his creditors, including among them the parties making the motion for security on her bond; that on the 9th day of November, 1907, Schnurman was duly adjudicated a bankrupt under the Acts of Congress relating to bankruptcy; that he surrendered all his property, and fully complied with all the requirements of all acts and all orders touching his bankruptcy; and that said proceedings in bankruptcy have been and still are pending in the District Court of the United States.

On June 1, 1908, she, as executrix, filed her petition in the bankrupts' court praying that the estate of her testator might be

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decreed to have a full discharge of all debts provable against it, except such debts as are excepted by law from such discharge; and that on the same day the judge of the district court "ordered that a hearing be had upon the petition on the 15th day of June, 1908, and that all known creditors and other persons in interest may appear and show cause, if any they have, why the prayer of the petition should not be granted."

The executrix further answering states that she is advised that the creditors of Schnurman have all filed their claims in the bankruptcy proceeding and will participate with the other creditors in the proceeds arising from the bankrupt's estate; that she had complied with the law and executed a bond as required by the chancery court by its order, and had collected all the estate as far as she knows, as shown by the appraisal of the estate adopted by her as an inventory, to-wit: the proceeds of an insurance policy, No. 112842, in the Fidelity Mutual Life Insurance Company of Philadelphia, upon the life of Henry Schnurman, amounting to \$1,743.28, and that she has proceeded to pay and is paying the debts of Schnurman arising since his adjudication as a bankrupt; that she is advised that the parties above named, who it is admitted were creditors of Henry Schnurman at the time of his adjudication in bankruptcy, have no interest in this estate in her hands; that they cannot claim anything more than the trustee or assignee in bankruptcy can claim, and the trustee in bankruptcy is making no claim for this money; that she is advised that, under the bankrupt laws of the United States, the creditors of the bankrupt have an interest only in such property as the bankrupt had at the time of his adjudication as a bankrupt; and that such creditors have no interest whatever in the estate now in her hands; and if the right of the creditors did depend upon the discharge of the bankrupt's estate, which she denies, there is nothing before this honorable court to show that the bankrupt's estate will not be discharged from bankruptcy.

On the 3rd day of June, 1908, the executrix declining to

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execute a bond with surety, her powers were revoked; and the case is before us upon her petition for a writ of error to that order.

Section 2642 of the Code provides, that "Where the will directs that an executor shall not give security, the court or clerk shall not require it of him, unless on the application of any person interested or upon its or his own knowledge it or he thinks security ought to be required."

Schnurman was adjudicated a bankrupt during his lifetime, upon his own petition. He died without having been discharged. His widow and executrix has applied for a discharge, but that, so far as this record discloses, has never been granted. The whole subject is before the District Court of the United States. It, and it alone, can determine whether or not the estate of the decedent will ever be entitled to a discharge from its indebtedness. The order appealed from was merely to preserve the estate of the bankrupt, whatever it might be, for the benefit of whom it might concern. The chancery court, sitting as a court of probate, is, under the section above referred to, clothed with a wide discretion, the exercise of which should not be interfered with except in a case where it has been plainly abused.

It is true that the title to all the property of a bankrupt vests in the trustee, and that the trustee alone can sue to recover it; but the proceeding under review is in no sense for the recovery of property. It is merely an application to the court to require security to be given for the safety of a fund in which the applicants deem themselves interested. The court could have taken the same action at the instance of its clerk, or as a result of its own knowledge upon the subject.

We are of opinion that the court has not exceeded, in its order, the proper exercise of the discretion with which it is clothed, and its judgment is affirmed.

*Affirmed.*



## Statement.

**Mytherville.**

## SHREVE v. NORFOLK AND WESTERN RAILWAY CO.

June 10, 1909.

1. RAILROADS—*Conveyance for Depot Purposes—Deeds—Conditions—Covenants.*—A deed conveying land to a railroad company for "depot and other railway purposes" in consideration of the grantee's agreeing to erect and maintain a depot on the land conveyed, but containing no clause of forfeiture or right of re-entry for failure to do so, vests in the grantee a fee simple estate in the land conveyed, and the superadded words do not create a condition subsequent but only an agreement or covenant on the part of the grantee to use the land for the purpose specified. The deed is founded upon a valuable consideration, and the language used is to be taken most strongly against the grantor.
2. DEEDS—*Conditions Subsequent—Intention—How Ascertained—Case at Bar.*—Conditions subsequent are not favored in law, and are construed strictly because they tend to destroy estates. In determining whether the parties intended to create a covenant or a condition, it is necessary to consider the language employed, the situation of the parties, their relation to the subject of the transaction, and the object in view. The application of this rule to the facts of the case at bar shows that a covenant and not a condition subsequent was intended.

Error to a judgment of the Circuit Court of Tazewell county in an action of ejectment. Judgment for the defendant. Plaintiff assigns error.

*Affirmed.*

The opinion states the case.

*Greener & Gillespie*, for the plaintiff in error.

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*Henry & Graham and S. D. May*, for the defendant in error.

CARDWELL, J., delivered the opinion of the court.

**This** litigation arises out of the following state of facts: On the 19th day of August, 1889, Geo. W. Gillespie and wife were the owners in fee simple and in the possession of about 400 acres of land in one boundary, situated in the Richlands, on Clinch river, Tazewell county, Virginia, and by deed of that date they conveyed two parcels of the 400 acres, aggregating about three acres, to the Norfolk and Western Railway Company, the granting clause being as follows:

*"Witnesseth*, that in consideration of the said The Norfolk and Western Railroad Company agreeing to erect and maintain a depot on the land conveyed by this deed the said George W. Gillespie and Barbara E. Gillespie, his wife, do grant unto the said The Norfolk and Western Railroad Company for depot and railway purposes all those two certain tracts, pieces or parcels of land, lying in Tazewell county, State of Virginia, situate in the Rich Lands."

The covenants contained in the deed are general and in this language:

*"And the said George W. Gillespie and Barbara E. Gillespie do covenant that they will warrant generally the property hereby conveyed, that they have the right to convey the said lands to the said Norfolk and Western Railroad Company, that the said Norfolk and Western Railroad Company shall have quiet possession of the said lands free from encumbrances; that they will execute such further assurances of the said lands as may be requisite, and that they have done no act to encumber the said lands."*

The Norfolk and Western Railway Company claims and holds, under successive conveyances from the Norfolk and Western Railroad Company the title vested in the Norfolk and Western Railroad Company by the deed of August 19, 1889; and at

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the point of the location of the land the railroad had been built, and the Norfolk and Western Railroad Company and its successor to the title has had possession of the land ever since the deed was made in August, 1889, up to the institution of this suit—or, as one witness says, “ever since it was staked off.”

By deed dated April 14, 1890, Gillespie and wife conveyed the remainder of their boundary of the 400 acres of land to the Tazewell Land and Improvement Co., in which conveyance the three acres theretofore conveyed to the Norfolk and Western Railroad Company is expressly excepted, but the conveyance, after reciting that “the land company had purchased the land conveyed and are engaged in laying out a town and expect to expend large sums of money in the improvement and building up of said town, relying on the said agreement of the Norfolk and Western Railroad Company to comply with their said contract, to-wit, to erect and maintain a depot on said two pieces of land,” contains this clause:

“Now, in consideration of the premises, and for the consideration aforesaid, the parties of the first part hereto do hereby grant, assign and transfer unto the party of the second part hereto all their right, title and interest in and to said contract between themselves and said Norfolk and Western Railroad Company. This assignment and transfer of said contract is without recourse on the parties of the first part.”

By deed of June 24, 1904, the Tazewell Land and Improvement Company conveyed to R. W. Shreve the land acquired by it under the said deed from Gillespie and wife, which deed to Shreve contains this clause:

“There is also excepted and reserved from this conveyance any right, title and interest in three acres of land in two parcels conveyed by George W. Gillespie and wife to the Norfolk and Western Railroad Company for depot and railroad purposes by deed dated the 19th day of August, 1889, \* \* \* but the said party of the first part grants, conveys, assigns, and transfers to said Robert W. Shreve any right, title, claim or

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interest which the said party of the first part now holds under and by virtue of the deed from George W. Gillespie and wife to said company, dated the 14th day of April, 1890. \* \* \*

There has never been any depot house built on the two lots in question, but there was a section house erected on the lots, and switches and sidings placed on them, and the railway company has never refused to build a depot on the premises, but has repeatedly stated that it would do so as soon as the business at that point (the name of which is Doran) was of such magnitude as to warrant it; and this action of ejectment was brought by R. W. Shreve in 1907 against the Norfolk and Western Railway Company to recover the possession of the said two parcels of land.

At the trial of the cause, upon the plea of the general issue—not guilty—both parties agreed to submit the matters of law and fact to the judge of the court for decision; and the court, at its December term, 1907, rendered judgment in favor of the defendant, to which judgment this writ of error was awarded.

The learned and exhaustive arguments for both plaintiff in error and defendant in error have taken a very much wider range than our view of the case would require, and we shall not attempt to review the numerous authorities to which we have been cited as bearing upon the questions, first, whether the language and stipulations of the deed of August 19, 1889, from Gillespie and wife to the Norfolk and Western Railroad Company, constitute and make a condition subsequent, to be performed by defendant in error; and second, if such is the true construction of the deed, and that condition subsequent has not been performed, but has been broken, has plaintiff in error the right to recover the land in this his action of ejectment?

In our view of the case, the primary and controlling question is whether or not the language of the deed by clear and unmistakable terms affixes to the grant in the deed a condition subsequent, upon the breach of which the land and the right of re-entry thereon reverted to the grantors; or whether the lan-

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guage of the deed relating to the consideration is a naked promise, and at most only a covenant.

It will be observed that the deed in question does not, as is the usual form, affix to the grant a condition subsequent, but the only language used to indicate an intention to attach a condition to the absolute grant of this land to the grantee is that the grant is, "in consideration of the said Norfolk and Western Railroad Company agreeing to erect and maintain a depot on the land conveyed.\* \* \*" No time is mentioned when this promise or agreement is to be carried out, nor is there any specification as to character or quality of the depot to be erected and maintained; nor is there expressed a reservation of title to the land in the grantors by reversion upon the breach of the promise or agreement made by the grantee, nor any intimation of the right to re-enter upon the land upon the breach of the promise or agreement to erect or maintain a depot on the premises.

In the brief of counsel for plaintiff in error it is conceded to be too well settled to admit of citation of authority, that "conditions subsequent are not favored in law, and are construed strictly because they tend to destroy estates; and the vigorous exacting of them is a species *summum jus*, and in many cases hardly reconcilable with conscience."

It is also recognized that "in the construction of every instrument, where the courts are asked to say whether the language used creates a covenant or a condition, the intention of the parties governs. If the parties to the instrument say upon its face that there is to be a forfeiture if its terms are not complied with, then the forfeiture is declared, regardless of results; and the converse is equally true."

So, as stated in *Union Stock Yards Co. v. Packing Co.* (C. C. A.), 140 Fed. 701 in determining the intention of the parties, and whether the terms of the instrument create a covenant or a condition, it becomes necessary to consider "the language em-

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ployed, the situation of the parties, their relation to the subject of the transaction and the object in view."

We have already adverted to the language employed in the deed, and we will now look, in that connection, to "the situation of the parties, their relation to the subject of the transaction, and the object in view."

The undisputed and pertinent facts to be considered in this connection are that, shortly after the Clinch Valley Division of the Norfolk and Western Railroad Company was completed there was some indication that a depot would be needed at Doran. The railroad company was looking out for a place to locate the depot when it became necessary to erect it, and Gillespie, under whom plaintiff in error claims, who owned, as stated, about 400 acres of land at that place, conceiving the idea doubtless that a town might be laid out and built up there, making a depot at Doran not only desirable, but necessary, offered to give the railroad company a lot of land necessary for the railroad's purposes if it would erect and maintain a depot there, and the railroad company accepted the proposition, and a deed was drawn to that effect. This is, as counsel for plaintiff in error say, the plain import of the language used in the deed; and they further say "that a depot was not necessary at the time the conveyance was made, and perhaps has not been necessary since is claimed by the company and established by the record." In other words, Gillespie voluntarily offered to give the land needed for a depot at Doran, and the railroad company accepted the offer, the only binding effect being predicated upon the promise or covenant on the part of the railroad company to build and maintain the depot when the conditions at that point, in the economical and successful operation of the railroad as a public service corporation required it.

As counsel for plaintiff in error further say, "both parties to the deed knew that railroad companies could only erect depots at those places where the needs of the public required

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them," and the point at Doran was not an exception to that rule. But although the loss to Gillespie of the increase in the value of the residue of his 400-acre tract of land resulting from the public needs not requiring a depot at Doran may be ever so great, this does not so change the rule of construction of his deed under which plaintiff in error seeks to maintain this action of ejectment to recover the land conveyed. Neither the language of the deed in question nor the subsequent conveyance of the residue of the 400-acre tract of land indicates an intention on the part of Gillespie that the title to the three acres conveyed to the railroad company for a depot site should revert to him in the event that no depot was built thereon. Not only is there no language used in his deed to the railroad company to declare a forfeiture in that event, but when read in the light of his subsequent conveyance to the land company, in which he expressly excepts therefrom the three acres theretofore conveyed to the railroad company and only assigns to the land company such right, title or interest as he had "in and to said contract between themselves and the said Norfolk and Western Railroad Company"; and this "assignment and transfer" too "without recourse" to the grantors, it cannot be doubted that Gillespie regarded that he only held a covenant on the part of the railroad company to erect and maintain a depot at Doran, and did not consider that the title and possession of the land would revert to him in the event that the public needs did not warrant the erection and maintenance of the depot contemplated. If such was not the construction of the conveyance, as understood by the grantors, it is inconceivable that they would have omitted therefrom language plainly declaring that the title and possession of the land conveyed was to revert to them in the event that a depot was not erected and maintained on the land granted.

Almost the identical question presented here, *i. e.*, the comparative weight and standing to be given in a court of law to a promise or *covenant*, and a condition subsequent, was con-

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sidered by this court in *King v. N. & W. Ry. Co.*, 99 Va. 625, 39 S. E. 701, and there the stipulations in the conveyance which were the subject of litigation were construed as *covenants*, and not conditions. The court, speaking through Harrison, J., and after a statement as to the contentions of the parties and the settled rule of law governing in construing the conveyances, said: "We are of opinion that the language employed in the deeds under consideration is apt language to create a fee simple, and that the superadded words, under the authorities, amount to covenants rather than conditions. The deeds are not voluntary, as contended, but are based upon the benefits to accrue to the reserved property of the grantor by reason of the use of the granted premises as a railroad terminal; hence they must be interpreted as any other deeds based upon a valuable consideration. The language is to be taken most strongly against the grantor, and most favorably to the grantee."

The features of the conveyance under consideration in that case were stronger in favor of a construction that a *condition* and not a *covenant* was intended by the contracting parties than are those contained in the deed we now have under consideration. In fact, the language in the deed before us, in apt words, creates a fee simple in the land granted, and there are no superadded words declaring in express terms or by clear implication, or in any terms whatever, that the non-performance of the promise and agreement of the grantee, stated to be the consideration moving the grantor to make the conveyance, should operate as a forfeiture of the land, giving the grantors the right to re-enter and possess themselves of it. In such a case, as is also said in the opinion just cited, the courts will incline to construe the language of the deed as creating only a *covenant*, and not a *condition*, thus adopting the more benignant construction upholding the instrument, and leaving the parties to pursue their appropriate remedies for a breach of covenant.



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The principles of law adverted to are fully recognized in *Lowman v. Crawford*, 99 Va. 688, 40 S. E. 17, and in *Alex. & Wash. R. Co. v. Chew*, 27 Gratt. 547, where they are discussed at some length, the opinion saying: "When the grantor seeks to destroy an estate which he himself has created, it must plainly appear that the act is within the very terms of the condition and breach. It is not sufficient to show mischiefs and even losses which might have been provided against had they been foreseen. The fact that they were not and could not have been anticipated may be a sufficient reason for the failure to provide a remedy; but they cannot justify the courts in so enlarging the operation of the covenant as to make them a ground of forfeiture."

They are discussed also by the leading text-writers and commentators of the law, and the uniform view taken is in accord with the decided cases mentioned above and to follow. 1 Sharswood & Budd's L. Cas. in the Amer. L. of R. Prop., p. 123, *et seq.*; 4 Kent's Com. (2nd ed.), pp. 122-129; 2 Min. Inst. (4th ed.), p. 265-6; 2 Minor on R. Prop., sec. 529; 2 Dev. on Deeds, sec. 970, and notes.

In *Green v. O'Connor*, 18 R. I. 56, 26 Atl. 692, 19 L. R. A. 262, the deed conveying land contained these words: "This conveyance is made upon the condition that the said strip of land shall be forever kept open and used as a public highway and for no other purpose." *Held*, to create a covenant and not a condition subsequent, as claimed by the plaintiff, the opinion saying: "The clause in question is merely a declaration of the purpose for which the land conveyed was to be used and improved, to-wit, as a highway. It contains no language which imports that the grant shall be void in case the purpose for which the land is conveyed is not carried out; nor does it reserve to the grantors and their heirs the right, in that event, to re-enter on the land and resume possession of it as of their former estate. Moreover, the purpose declared is in its nature general and public, and not one inuring specially to the benefit

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of the grantors. Such a declaration does not create an estate on condition, but merely imposes a confidence or trust on the land, or raises an implied agreement on the part of the grantee to use the land for the purpose specified."

It is very true that the court in that case quotes the statute governing such conveyances, but that fact does not detract from the force of the discussion of the general principles controlling in determining whether the language used in a conveyance of land should be construed as creating a covenant or a condition subsequent.

In *Rawson v. Inhabitants of School Dist. No. 5*, 7 Allen (Mass.), 125, 83 Am. Dec. 670, the opinion by the court, Bigelow, C. J., after stating that a deed will not be construed to create an estate on condition, unless language is used which, according to the rules of law, *ex proprio rigore*, imports a condition, or the intent of the grantor to make a conditional estate is otherwise clearly and unequivocally indicated, and that conditions are not to be raised readily by inference or argument, says: "We believe there is no authoritative sanction for the doctrine that a deed is to be construed as a grant on a condition subsequent solely for the reason that it contains a clause declaring the purpose for which it is intended the granted premises shall be used, where such purpose will not inure specially to the benefit of the grantor and his assigns, but is in its nature general and public, and where there are no other words indicating an intent that the grant is to be void if the declared purpose is not fulfilled.

"If it be asked whether the law will give any force to the words in a deed which declare that the grant is made for a specific purpose or to accomplish a particular object, the answer is that they may, if properly expressed, create a confidence or trust, or amount to a covenant or agreement on the part of the grantee. This it is said in *Duke of Norfolk's Case*, Dyer, 138b, that the words *ea intentione* do not make a condition, but a confidence and trust. See also *Parish v. Whitney*, 3

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Gray, 516, and *Newill v. Hill*, 2 Met. 180, and cases cited. But whether this be so or not, the absence of any right or remedy in favor of the grantor under such a grant to enforce the appropriation of land to the specific purpose for which it was conveyed, will not, of itself, make that a condition which is not so framed as to warrant in law that interpretation. An estate cannot be made defeasible on a condition subsequent by construction founded on an argument *ab convenienti* only, or on considerations of supposed hardship or want of equity."

We are of opinion that the deed under review does not admit of the construction contended for by plaintiff in error, but that its language creates only an agreement or covenant on the part of the grantee, and that the judgment of the circuit court in favor of defendant in error in this action of ejectment is plainly right.

Having taken this view of the case, it is unnecessary to consider the remaining question, whether upon the breach of a condition subsequent annexed to a grant of land, an assignee of the grantor's right to recover the land can maintain an action of ejectment.

The judgment of the circuit court is affirmed.

*Affirmed.*

## Statement.

**Mytherville.**

## SLINGLUFF v. COLLINS.

June 10, 1909.

1. **PROCESS—Return—Signature of Officer.**—A return on a writ or process is the short official statement of the officer endorsed thereon of what he has done in obedience to the mandate of the writ, or why he has done nothing. The signature of the officer thereto is no part of the return, but is merely intended to authenticate it.
2. **EXECUTIONS—Return of Officer—Lack of Signature—Amendment—Time of Making.**—Where the truth of a return on an execution is not questioned, and no good reason to the contrary is shown, the officer making it should be allowed to amend by signing it, and thus make valid that which before had no appearance of official authenticity. Courts are liberal in allowing amendments of returns in proper cases, so as to conform to the truth, and the amendment when made has the same effect as though it were the original return, where the right of third persons have not intervened, and it does not appear that injustice can result to anyone. There is no specific time within which a return must be amended, but after a great lapse of time an amendment should be permitted with caution, and in no case should it be allowed unless the court can see that it is in furtherance of justice.
3. **EXECUTIONS—Return Before Return Day—Notorious Insolvency.**—A return on an execution "no effects known to me" is not vitiated by the fact that it is made before the return day of the writ, where, as in the case at bar, it is an agreed fact that, at the time the writ was placed in the hands of the officer, the defendants were notoriously insolvent.

Error to a judgment of the Circuit Court of Madison county on a motion to quash an execution. Judgment for the defendant in the execution. Plaintiff assigns error.

*Reversed.*

The opinion states the case.

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*Hiram M. Smith*, for the plaintiff in error.

*L. O. Wendenburg* and *Stuart Bowe*, for the defendant in error.

HARRISON, J., delivered the opinion of the court.

The facts agreed in this case are, that in the year 1889 the firm of Slingluff, Disney & Co. obtained in the Circuit Court of Madison county a judgment against the firm of Collins & Yager for the sum of \$611.56, with interest from the 1st day of May, 1889, till paid, and costs in the sum of \$16.06; that in September, 1889, an execution was issued on this judgment, returnable to first December rules, 1889, and was placed in the hands of T. N. Berry, deputy scherriff of Madison county: that the debtor firm was at the time notoriously insolvent: that Berry, the deputy sheriff, made on this execution the following endorsement: "No effects known to me this 8th day of November, 1889," but did not sign the endorsement; that the execution with the unsigned endorsement was returned to the clerk's office on or before the return day thereof, and the unsigned endorsement was entered by the clerk in his execution book, and no other execution was issued on the judgment within seventeen years after the return day of such execution: that on the first day of January, 1908, a third execution was issued on this judgment, directed to the sheriff of Henrico county, and returnable to the first March rules, 1908; that prior to the issuing of this last mentioned execution, Horace Slingluff, the plaintiff in error, had become the successor to the firm of Slingluff, Disney & Co., and the sole owner of all its assets, and G. T. Collins had become the sole surviving partner of the debtor firm, his two partners, W. A. Collins and W. C. Yager, having died, the former in 1900, and the latter in 1896; and that T. N. Berry, the deputy sheriff who made the unsigned endorsement on the first execution is still living.

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The record shows that, after the execution of January, 1908, was issued and levied upon property of the surviving judgment debtor in the county of Henrico, notice of a motion to quash the execution was served on the plaintiff in error, upon the ground that no return having been made upon the original execution and no other execution having been issued within ten years, the same was not enforceable under section 3577 of the Code. Thereupon, the plaintiff in error served the defendant in error with notice of a motion for leave to amend the return upon the original execution by having the deputy sheriff sign the return he had endorsed thereon.

These two motions were heard together, and the circuit court refused to allow the sheriff to amend the return on the original execution by signing the same, and quashed the execution issued in January, 1908. To this judgment the present writ of error was awarded.

It is contended on behalf of the defendant in error, that the endorsement by the sheriff on the execution in question is invalid without his signature affixed thereto, and cannot be made valid by now affixing his signature to such return; the position taken being that, inasmuch as section 900 of the Code provides that the officer to whom the process is directed "shall make true return thereon of the day and manner of executing the same, and subscribe his name to such return," the present is not a proper case for amendment; that the absence of the sheriff's signature makes the return a mere nullity. In other words, that a return not signed by the officer is no return at all.

"A return on a writ of process is the short official statement of the officer endorsed thereon of what he has done in obedience to the mandate of the writ, or why he has done nothing." *Rowe v. Hardy*, 97 Va. 674, 676, 34 S. E. 625, 75 Am. St. Rep. 811.

The signature is not a part of the return proper. Its function is merely to authenticate the return. That the signature was not regarded by the legislature as an integral part of the

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return is plain from an examination of the statutes. Section 900 of the Code contains two provisions: 1st, of what the return shall be; and 2nd, that the officer shall subscribe his name to such return. Section 901 provides for failure to make return and for a failure to subscribe the return. Other sections of the Code show that the signature of the officer to the return was not intended as part of the return, but merely as an authentication of the memorandum as a true return by the proper officer. Section 3577 of the Code expressly provides, that "any return by an officer on an execution showing that the same has not been satisfied shall be a sufficient return within the meaning of this section."

The courts pursue a liberal policy in allowing amendments whenever they can see that it will be in the furtherance of justice.

In *Shenandoah R. Co. v. Ashby's Trustees*, 86 Va. 233, 9 S. E. 1003, 19 Am. St. Rep. 898, this court stated that the amendment should not be allowed unless the court could see that it would be in the furtherance of justice, and added: "In a proper case, however, leave to amend, so as to make the return speak the truth, ought to be and usually is liberally granted, and when the amendment is made, the same effect is to be given the return, as amended, as though it had at first been put in its present form."

In *Hamilton v. McConkey's Admr.*, 83 Va. 533, 2 S. E. 724, the point was made that a defective or insufficient return was no return, but this court held otherwise, saying: "Whether this return is true or false, sufficient or insufficient, is not a question which can arise under the statute (section 3577). The statute does not prescribe concerning a true or sufficient return, but concerning a return of an officer. The law provides ample and speedy methods by which all irregularities of an officer may be corrected, ample machinery by which any injury the officer may do by a false or insufficient return may be speedily redressed."

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The endorsement upon the execution in the present case measures up to the statutory requisites of a return, for it is not questioned that it was made by an officer clothed with authority and acting in the discharge of his duty. Being a return, the amendment, by adding the omitted signature of the sheriff, must be allowed so as to make it speak the truth authoritatively.

Freeman on Executions, Vol. III, p. 2044, citing a number of authorities in support of the text, says: "A return may be amended by affixing to it the signature of the officer, and thus making valid that which before had no appearance of official authenticity."

Again, at p. 2135, this author says: "Where the truth of a return is not questioned and no good reason to the contrary is shown, the officer should be allowed to amend by signing it."

In the case of *Excelsior Mfg. Co. v. Boyle*, 48 Kan. 202, 26 Pac. 408, it is held that the failure of the sheriff to sign his return on an execution was amendable error which could be corrected by allowing him to affix his signature thereto.

It is further insisted that, because there was no property subject to the execution when it came into the hands of the officer, it does not follow that the debtor will continue to have none until the return day.

The execution in this case was returnable to the 1st December rules, 1889. The return of the sheriff is: "No effects known to me this 8th day of November, 1889." The position is that the officer was without power or authority to return the execution until the return day had arrived; that in the interval between the date of the endorsement on the execution and the return day the debt might have been collected.

One of the agreed facts in this case is that at the time this execution was put into the hands of the sheriff of Madison county, the debtors therein were notoriously insolvent. Under such circumstances it cannot be assumed, without evidence,



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that the sheriff was derelict in returning the execution, "no effects known to me," before the return day.

In 3 Freeman on Executions, p. 2019, it is said: "There is no good reason why the sheriff should delay returning the writ when it is apparent that nothing can be found out of which to satisfy it. It is rather his duty, by promptly returning the facts, to open the way for supplemental proceedings, and aid the purpose for which the execution was put into his hands."

It is true that a long time has elapsed since the return of the original execution in 1889 and the motion to amend the return by affixing the signature of the sheriff thereto in 1908, but there is no specific limitation of time within which the power to amend may be exercised. After a considerable lapse of time, however, such power should be exercised with caution, and in no case is it to be exercised unless the court can see that it will be in furtherance of justice.

In the case at bar, the agreed facts show that, at the time the original execution was returned, the defendants therein were notoriously insolvent. There is nothing in the record to suggest that the judgment has been paid—indeed, no effort is made to show that it has been satisfied; nor is there anything to indicate that there has ever been a moment that it could have been enforced until the present effort was inaugurated. It is manifest from the record that the judgment has lain dormant for the reason that there was no opportunity to enforce it. The rights of third parties have not intervened or attached in the mean time, and it does not appear that any injustice can result to anyone from permitting the plaintiff in the judgment to compel its satisfaction by the surviving judgment debtor; on the contrary, such a course would seem to be in furtherance of justice.

For these reasons, the judgment complained of must be reversed and set aside; and this court proceeding to enter such judgment as the circuit court ought to have entered, it is ordered that T. N. Berry, deputy sheriff for Madison county,

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be allowed *nunc pro tunc* to amend his return on the original execution in question by affixing his signature in his official capacity to such return. And it is further ordered that the motion of the defendant, G. T. Collins, to quash the execution issued January 1, 1908, be, and the same is hereby, overruled.

*Reversed.*

**Mytherville.**

## STRAUSE v. RICHMOND WOODWORKING CO.

June 10, 1909.

1. CORPORATIONS—*Liability of Promoters—Instructions—Partial View of Evidence.*—The tendency of modern decisions is to hold that those dealing with promoters shall have the double security of the promoter and of the corporation when one is formed, unless it clearly appears that the liability of the promoter was not intended, or that it was intended to be released when the liability of the corporation began. If, however, there is evidence tending to show that it was not the intention of the contracting parties that the promoter should be liable, but that the corporation and not the promoter should be liable, and it was in fact looked to and part payments received from it until insolvent, an instruction which directs the attention of the jury to that part only of the evidence, which tends to fix a liability on the promoter, and ignores that which tends to support a different conclusion, and authorizes a verdict on the evidence thus singled out, is misleading and constitutes reversible error.
2. CONTRACTS—*Construction—Terms of Contract—Question for Jury—Instructions.*—While the construction of the contract, in the case at bar, was for the court, still the question as to what was the contract or agreement of the parties as to the liability or non-liability of the defendant, who was the promoter of a corporation, was a question of fact for the jury; and, in determining that question, they should have been instructed to take into consideration all of the evidence, oral and written, bearing upon that issue.
3. CORPORATIONS—*Liability of Promoter—Exemption from Liability—Evidence—Credit to Corporations.*—A promoter cannot be held liable in the face of the contract against liability, fairly and legally entered into; and, in determining the question whether or not he has been freed from liability by the other contracting party, facts as to the latter's acts, or of an agreement that he

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was not to be held liable, are not to be ignored. The fact that no bill was ever rendered to the promoter, but credit was given on the books of the creditor to the corporation, the goods delivered to it, and payments received from it, and that no demand was made upon the promoter until after the solvency of the corporation became questionable, are very potential in the determination of the question of the liability or non-liability of the promoter.

Error to a judgment of the Law and Equity Court of the city of Richmond in an action of *assumpsit*. Judgment for the plaintiff. Defendant assigns error.

*Reversed.*

The opinion states the case.

*A. G. Collins and Leake & Carter*, for the plaintiff in error.

*Braxton, Williams & Eggleston*, for the defendant in error.

CARDWELL, J., delivered the opinion of the court.

This writ of error is to the judgment of the Law and Equity Court of the city of Richmond in an action of trespass on the case in *assumpsit*, brought by defendant in error against plaintiff in error to recover a balance alleged to be due on account for the manufacture of a certain implement called a shock binder, delivered to the "American Shock Binder Corporation," pursuant to contract entered into by defendant in error with plaintiff in error. The verdict and judgment are for \$3,502.24, and we are asked to review and reverse the judgment because of misdirection of the jury in giving and refusing instructions.

It appears that there were negotiations between plaintiff in error and one Louis Smith, the general manager of defendant in error, leading up to and culminating in certain letters which are alleged to evidence the contract between the parties to this controversy. These letters are as follows:

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"May 22, 1906.

"Mr. M. M. Strause,

"c/o Bache Implement Co., City.

"Dear Sir:

"As per your request, we take pleasure in quoting you on 25M shock binders, as per sample submitted.

"We can furnish this lot at 23¢ each, f. o. b. our works. Terms: 2% in 10 days; 30 days net. This estimate is based on the following specifications:

"The binder to be manufactured equal in workmanship and material to the sample submitted, to have not over 10 feet of rope to each binder; your company is to furnish the necessary castings, finished complete with holes drilled to secure same to spindle. We will not assume any responsibility for any delay in the delivery of these castings.

"We would suggest that you place your order with us at once, as it will take a little time to prepare for this work, and you have our assurance that everything possible will be done to rush this order to completion upon receipt of castings. We cannot promise prompt delivery if the order is not placed before May 29th, owing to the large quantity of other work at our mill.

"Sincerely trusting to hear favorably from you, we remain,

"Yours very truly,

"RICHMOND WOODWORKING COMPANY,

"LOUIS SMITH, General Manager."

"May 29/06.

"Richmond Woodworking Co.,

"City.

"Dear Sirs:

"Yours of the 22nd instant received, and I herewith order 25,000 Fountaine shock binders, as per sample now in your

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possession, upon the terms and conditions specified in your letter of 22nd instant, at the price of twenty-three cents each.

"Yours truly,

"M. M. STRAUSE,

"For AMERICAN SHOCK BINDER CORP."

The oral testimony and the letters themselves tended to prove that there had been not only negotiations between the parties prior to the letters, but that the general manager and agent of the defendant in error was apprised and fully understood that plaintiff in error was negotiating for and on behalf of the American Shock Binder Corporation, which was chartered on the 13th day of June, 1906, and organized on the 22nd day of June, 1906. Such was the character of the negotiations leading up to the written correspondence, that it was fully understood that plaintiff in error was acting for the company in process of being organized, and not for himself, and in fact this is admitted by Smith in his examination as a witness on behalf of defendant in error.

It further appears that the first shock binders, by direction of plaintiff in error, and quite naturally in view of the facts and circumstances which the evidence tended to prove, were delivered by defendant in error, not to the plaintiff in error, Strause, but to the American Shock Binder Corporation, on the 29th day of June, 1906, about two weeks after it was chartered and about one week after it was organized, and were accompanied by a delivery ticket addressed, not to the plaintiff in error, but to the American Shock Binder Corporation; that all the shock binders made were so delivered; that accounts were rendered by defendant in error, not to plaintiff in error, but to the Shock Binder Corporation; that all the charges on the books of defendant in error therefor were made, not against plaintiff in error, but against the American Shock Binder Corporation, and all payments thereon, amounting to more

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than \$1,500, were made by that corporation's checks; that the account on the books of defendant in error against the Shock Binder Corporation remained as charged up to the trial of this cause; and that the bill against plaintiff in error sued on was made out against plaintiff in error, as stated by defendant in error's bookkeeper and witness, "subsequently, after all this trouble" (referring, no doubt, to trouble in getting payment from the Shock Binder Corporation), and after the Shock Binder Corporation had become insolvent.

After the evidence had gone to the jury, the trial court gave, at the request of the defendant in error, four instructions Nos. 1, 2, 4 and 5, over the objection of plaintiff in error, and refused to give instructions "A" and "B," asked by him; and these rulings of the court constitute plaintiff in error's first assignment of error.

While all of the four instructions given for defendant in error were excepted to, the objection urged here is against instruction No. 1, which is in these words:

"If the jury believe from the evidence that the defendant wrote or caused to be written, to the plaintiff, and mailed or delivered, or caused to be mailed or delivered, to the plaintiff, the letter in evidence, which is dated May 29/06, and which is signed 'M. M. Strause, for American Shock Binder Corp.,' and if the jury further believe from the evidence that the defendant, in using the words following his name, viz.: 'for American Shock Binder Corp.,' referred to a contemplated or proposed corporation, but one for which no charter of incorporation had, at that time, been granted; then the jury are instructed that the said letter bound the defendant, M. M. Strause, personally and individually, just as if the said words 'for American Shock Binder Corp.' had not been added after the defendant's name; and that the said letter, together with the letter of the plaintiff, to which it refers, constituted a contract between the plaintiff in this case and the said defendant, M. M. Strause, personally and individually."

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Upon the soundest reasoning, the tendency of the courts in recent years is to an adherence to the doctrine, that those dealing with promoters should be left with the double security of the promoter and the company when one is formed, unless it clearly appears that the liability of the promoter was not intended, or that it was intended to be released when the liability of the corporation began; but where the evidence, as in this case, consisting of oral statements of witnesses as to facts and circumstances and a correspondence in writing, tends to show that it was not intended by the contracting parties that a person active in the promotion and organization of a corporation should be liable for goods or supplies furnished to the corporation, but that the party furnishing the goods or supplies understood and agreed that he was to look to, and did in fact look to and receive payment in part from, the corporation, and was not to look to or demand payment from the promoter or organizer of the corporation, and in fact did not look to or demand payment from him until the insolvency of the corporation; an instruction which directs the attention of the jury to the written evidence only, ignoring the oral testimony, and authorizes a verdict on this evidence, singled out, is misleading and constitutes reversible error.

"An instruction must not call special attention to a part only of the evidence and the fact which it tends to prove, and disregard other evidence relative to the matter in issue." *Douglas Land Co. v. Thayer Co.*, 107 Va. 292, 58 S. E. 1101, and authorities there cited.

It is very true that the bill of exception taken with respect to the rulings of the court on the instructions asked and refused certifies that "it was contended by the counsel for the defendant as well as counsel for the plaintiff, in argument of the instructions, that the construction of the contract and the liability or non-liability of the defendant on the letters and evidence in the case was a matter of law for the court to determine and not for the jury;" still the question as to what was



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the contract—what the understanding and agreement of the parties—as to the liability or non-liability of plaintiff in error was a question of fact for the jury; and in submitting that question to them they should have been directed to take into consideration all the evidence, oral and written, bearing upon that issue.

While instruction “A,” asked by plaintiff in error and refused, refers to the facts and circumstances surrounding the parties in their dealings leading up to the two letters referred to in defendant in error’s instruction No. 1, it did not as fully and as fairly as it should have done submit the question as to what was the understanding and agreement of the parties with respect to the liability or non-liability of plaintiff in error, to be determined upon a consideration of all the evidence bearing upon that issue; therefore it was not error to refuse the instruction.

The theory of defendant in error that, in the face of the facts and circumstances which the evidence tended to prove, plaintiff in error was liable in this action, rests entirely upon that line of authorities sustaining the doctrine as stated in Taylor on Private Corporations, sec. 76, viz.: “It follows that the promoter of a future corporation ordinarily is personally liable to the other contracting party, because the promoter has no principal, and the subsequent adoption of the contract by the corporation, when organized, will not free the promoter from his liability to the other contracting party without the consent of the latter, because it cannot be presumed that a party contracting gives credit to a corporation not yet organized, and, therefore, not yet capable of being bound.”

The rule as thus stated is general and is unquestionably sound, but to apply it to this case for the benefit of defendant in error, not only would the exception indicated in the rule have to be ignored, but also the elementary doctrine that parties *sui juris* may enter into any contract that they choose to enter into, if the contract be not for an immoral or illegal purpose.

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The general rule as to a promoter's liability cannot, in reason or fair dealing, be carried to the extent of holding him liable in the face of his contract against liability, fairly and legally entered into; and, in determining the question whether or not he has been freed from liability by the other contracting party, facts as to the latter's acts, or of an agreement that he was not to be liable, are not to be ignored. Admitted facts, that the creditor delivered his goods to the corporation after its organization, charged the corporation therefor on his books, received payment at different times from the debtor corporation, and never rendered a bill to the promoter for goods delivered to the corporation, or demanded payment of him, until after the solvency of the corporation became questionable, are very potential in the determination of the question of liability or non-liability of the promoter.

Instruction "B," asked by plaintiff in error is as follows: "The burden is on the plaintiff in this case to prove by a preponderance of the evidence that the defendant agreed to make himself personally responsible for the manufacture of shock binders, and if the plaintiff had notice of or from the facts and circumstances surrounding the case, ought to have known that the shock binders contracted for were to be made for a corporation to be formed at the time the contract was made, but which was formed when said shock binders were made, the defendant is not liable personally, unless he agreed to become so, and no such agreement could have existed, unless the minds of the plaintiff and defendant were in accord on this point, unless the defendant employed such language as clearly showed that he intended to bind himself personally, and not the corporation. The fact that the plaintiff may have thought the defendant intended to make himself liable, if such fact existed, is not sufficient to bind the defendant."

For the reasons above stated, the first part of the instruction relating to the burden of proof as to whether plaintiff in error agreed to make himself personally responsible for the

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manufacture of the shock binders, etc., is not a correct statement of the law; and the latter part of the instruction, relating to facts and circumstances under which he would be responsible, is but a statement of propositions of law not necessary to have been stated had the jury been correctly instructed upon the main and controlling features of the case. If upon another trial of the case the evidence be substantially as at the former trial, and the jury is instructed as to the law in accordance with the views expressed herein, the giving of instruction "B" in any form will be unnecessary to a proper guidance of the jury in determining the facts.

The remaining assignment of error involves a review of the evidence, and as the case has to be remanded because of misdirection of the jury at the former trial, we deem it inexpedient to express any opinion with respect to the evidence.

The judgment of the lower court will be reversed and annulled, the verdict of the jury set aside, and a new trial awarded, to be had in accordance with the views expressed in this opinion.

*Reversed.*

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**Mytherville.**

THOMPSON v. NORFOLK AND PORTSMOUTH TRACTION CO.

June 10, 1909.

1. **APPEAL AND ERROR—Verdicts—Conflicting Testimony—New Trial in Trial Court—Demurrer to Evidence.**—The verdict of a jury is entitled to great respect and should not be set aside, even by the trial court, unless plainly against the weight of the evidence. The jury are the judges of the credibility of the witnesses, and where there is serious conflict of evidence on a material point, the judgment of the trial court setting aside the verdict will be reversed by this court on writ of error, and final judgment entered upon the verdict. To warrant a new trial where the evidence is conflicting, the evidence must be insufficient to sustain the finding of the jury. In considering such a case on a writ of error, it is not heard as upon a demurrer to the evidence.

Error to a judgment of the Court of Law and Chancery of the city of Norfolk in an action of trespass on the case. Judgment for the defendant. Plaintiff assigns error.

*Reversed.*

The opinion states the case.

*Edward R. Baird, Jr.*, for the plaintiff in error.

*W. H. Venable, H. W. Anderson and J. R. Tucker*, for the defendant in error.

KEITH, P., delivered the opinion of the court.

Mrs. Virginia D. Thompson brought suit in the Court of Law and Chancery of the city of Norfolk to recover damages

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for injuries received by reason of the negligence of the Norfolk and Portsmouth Traction Company. Upon the trial the jury found a verdict in her favor of \$3,000, which the court set aside, and at a subsequent trial, neither party offering any testimony, a judgment was entered for the defendant. The record of the first trial is preserved by proper bills of exceptions, and the case is before us upon a writ of error.

Mrs. Thompson was a passenger on a car of the Norfolk and Portsmouth Traction Company, and her account of the occurrence is that she rang the bell to stop the car, intending to alight at Madison street, but her signal was not obeyed, and she waived her hand to the conductor, and the car was brought to a standstill. She arose from her seat while the car was in motion and had gotten to the door when the car stopped, and she then stepped upon the platform. There was at the time no one upon the platform but herself and the conductor. Her statement of what then occurred is as follows: "I was holding on to the rail that goes down from the car, and I had hold of this with my right hand, and in attempting to alight from the car on the street, I had one foot—say the platform is here, in attempting to put the other foot on the street the car threw me suddenly, and it broke this arm, but I did not know it was hurt." She then goes on to describe with more particularity the injuries which she received, with respect to which it is sufficient to say, that they were of such a character that we are unable to say that the verdict was excessive in amount.

Her statement is corroborated by the testimony of her granddaughter, a child ten years of age, but who was not objected to as a witness. Mr. and Mrs. Childress also testify that they saw Mrs. Thompson come out on the end of the car; that she had hold of the railing and was about to step off, and just before she got her other foot upon the ground the car started and threw her.

Five disinterested witnesses, who were passengers upon the car at the time of the accident, testify in behalf of the de-

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fendant company. Their testimony is in conflict with that of the plaintiff in error.

There was no exception taken to the instructions given by the court to the jury. The question for decision, therefore, is purely one of fact.

It is true that the case does not come before us as upon a demurrer to evidence; and that, as was said by this court in *Chapman v. Virginia Real Estate Company*, 96 Va. 188, 31 S. E. 74, when the judge who presided at the trial is dissatisfied with the verdict and grants a new trial, some latitude must be allowed to his discretion. It is also true, as was said in *Marshall v. Valley R. Co.*, 97 Va. 654, 34 S. E. 455, while approving *Chapman v. Va. Real Estate Co.*, *supra*, that "the verdict of a jury, however, is entitled to great respect, and should not be disturbed, even by the trial court, unless plainly against the weight of the evidence."

This case seems to be very similar to that of *Morien v. Norfolk & Atlantic Terminal Co.*, 102 Va. 622, 46 S. E. 907, in which Judge Harrison says: "The contention of the defendant company is that the injury sustained by the plaintiff was the result of her own negligence in alighting from the car while it was in motion and slowing down to stop. The clearly defined issue of fact, therefore, submitted to the jury was, had the car stopped, or was it still moving when the plaintiff attempted to alight? The evidence on behalf of the plaintiff, if the jury believed it, fully sustained her contention that the car had stopped, and the evidence of the defendant was ample, if the jury believed that, to sustain its contention that the car was still in motion when the plaintiff attempted to alight. The jury accepted as true the evidence on behalf of the plaintiff, and returned a verdict in accordance therewith."

In *Virginia Fire & Marine Ins. Co. v. Hogue*, 105 Va. 355, 54 S. E. 8, Judge Cardwell, speaking for the court, says: "There is nothing better settled in this jurisdiction than that the credibility of witnesses and the weight to be given to their

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evidence in a particular case are properly to be determined by the jury. \* \* \* The mere fact that the court doubts the correctness of the verdict, or if on the jury would have rendered a different verdict, will not be sufficient to justify setting aside the verdict found by the jury. To warrant a new trial in cases where the evidence is conflicting, the evidence must be insufficient to warrant the finding of the jury."

We are of opinion that the judgment of the court of law and chancery should be reversed, and this court will proceed to enter a judgment in accordance with this opinion.

*Reversed.*

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Statement.

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**Mytherville.**

WASHINGTON, ALEXANDRIA AND MT. VERNON RAILWAY CO. v.  
TAYLOR.

June 10, 1909.

Absent, Cardwell, J.

1. MASTER AND SERVANT—*Defective Appliance—Knowledge of Defects—Declaration—Sufficiency.*—Where a recovery is sought by a servant against his master for an injury inflicted by an appliance which is alleged to have been in a defective condition, it must be alleged and proved not only that the appliance was out of repair and that the defect was the proximate cause of the injury, but that the master knew, or ought, in the exercise of ordinary care, to have known, of its defective condition. A declaration in such a case which fails to make this allegation is bad on demurrer. Wherever every allegation of fact in a declaration may be true and yet the defendant not liable to the plaintiff for the cause of action stated, the declaration is bad.

Error to a judgment of the Circuit Court of Alexandria county in an action of trespass on the case. Judgment for the plaintiff. Defendant assigns error.

*Reversed.*

The opinion states the case.

*James R. & H. B. Caton and Moore, Barbour & Keith*, for the plaintiff in error.

*Samuel P. Fisher and Jno. M. Johnson*, for the defendant in error.



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BUCHANAN, J., delivered the opinion of the court.

The amended declaration upon which the case was tried is as follows:

"David H. Taylor, plaintiff, complains of the Washington Alexandria and Mt. Vernon Railway Company, a corporation under the laws of the State of Virginia, who was summoned to answer the plaintiff of a plea of trespass on the case for this, to-wit, that heretofore, to-wit, on the 27th day of June, 1907, the said defendant was engaged in operating an electric railway within the State of Virginia and through the county of Alexandria, in which said county, the injury hereinafter complained of occurred; that said plaintiff, before and at the time of said injury, was employed by the said defendant as a track hand to work upon and keep in order the roadbed and track of the said defendant upon which its cars and trains were run, and thereupon it became the duty of the defendant to exercise reasonable care to protect the plaintiff from injury from its cars and trains while working upon its said roadbed, yet said defendant did not exercise reasonable care to protect the plaintiff from injury from its cars and trains while working on said roadbed, but carelessly and negligently failed so to do by not keeping in order, but allowing to become out of repair, a certain trolley pole on one of its cars, so that on the day and year aforesaid, in the county aforesaid, while the said plaintiff was working on the southbound or west track, when a certain train thereon approached, and the said plaintiff and his fellow-workman moved a safe distance to the side of the train to allow the said train to pass, and as the said train was passing them, the said trolley pole attached to the motor car of the same became unfastened or detached from the said car in some manner unknown to the plaintiff, and fell over the side of the said car, on which the said plaintiff was standing and struck the said plaintiff, knocking him down, and at the same time the rope from said trolley pole fastened to said motor car

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became entangled about the body of the said plaintiff and dragged or jerked him under, or his right leg beneath the wheels of the rear car of the said train, and the rear car and the wheels thereof passed over the said leg, whereby the said plaintiff's said right leg was so greatly bruised, mashed, torn and mangled that it became and was necessary to amputate the said leg below the knee. Wherefore by reason of the injury to the said plaintiff he has sustained damages to the extent of \$5,000, and therefore he brings his suit."

The defendant's demurrer to the declaration was overruled, and upon the trial there was a verdict and judgment in favor of the plaintiff.

The first error assigned is to the action of the court in overruling the demurrer to the declaration.

The principal objection made to the declaration is that it does not aver that the defendant knew or ought, in the exercise of ordinary care, to have known of the alleged defective condition of the trolley pole, the fall of which caused the plaintiff's injuries.

While it is the plain duty of the master to use ordinary care to provide reasonably safe, sound and suitable appliances and instrumentalities for the use of his servants, and to examine and inspect the same from time to time, and to use ordinary care to discover and repair defects, still unless he knows, or in the use of ordinary care ought to have known, that such machinery or appliances have become defective or unsafe, he is not liable for injuries resulting therefrom. *Va. & N. C. Wheel Co. v. Chalkley*, 98 Va. 62, 66, 34 S. E. 976, and authorities cited; *N. & W. R. Co. v. Jackson's Admr.*, 85 Va. 489, 8 S. E. 370 Va.; *Portland Cement Co. v. Luck*, 103 Va. 434-5, 49 S. E. 577.

As the only breach of duty assigned in the declaration on the part of the defendant was its negligence in permitting the trolley pole to get out of repair, there could be no recovery in the case, unless it was made to appear not only that the trolley

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pole was out of repair and that defect was the proximate cause of the accident, but that the defendant knew, or ought in the use of ordinary care to have known of its defective condition. Since it was necessary to prove this, it was also necessary to allege it.

This was expressly held in *N. & W. R. Co. v. Jackson's Admr.*, *supra*, in passing upon the declaration in that case. One of the objections made to the first count in the declaration in that case and sustained by the court was, that it did not aver that the alleged defects in the push pole were known to the defendant, or ought to have been known to it.

In *Va. Portland Cement Co. v. Luck*, *supra*, in passing upon the demurrer to the declaration, while not expressly stated, it is clearly implied, that where the breach of duty relied on for a recovery is the failure to keep the premises in reasonably safe repair the declaration must aver, either that the defendant had notice of the unsafe condition of the premises, or set out facts from which it was necessarily to be inferred that the company was aware of the unsafe condition of its premises. See pp. 434-5.

Neither is it expressly averred that the defect in the trolley pole was the cause of the plaintiff's injuries; nor can this necessarily be inferred from the facts stated.

Every allegation of fact in the declaration may be true and yet the defendant may not be liable to the plaintiff for the injuries suffered by him. Where that is the case, the declaration is clearly bad.

We are of opinion, therefore, that the court erred in overruling the demurrer; that its judgment must be reversed, the verdict set aside, the demurrer to the amended declaration sustained, and the cause remanded with leave to the plaintiff to amend his declaration, if he be so advised, and for further proceedings not in conflict with the views expressed in this opinion.

*Reversed.*

Syllabus.

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**Mythville.**

WASHINGTON SOUTHERN RAILWAY COMPANY V. CHESHIRE.

June 10, 1909.

1. **APPEAL AND ERROR—*Trial on Amended Declaration—Defects in Original.***—Where it is apparent that a case was tried on an amended declaration to which there was no demurrer and which stated a good cause of action, questions raised by a demurrer to the original declaration will not be considered in this court.
2. **MASTER AND SERVANT—*Safer Way of Doing Work—Duty of Master and Servant, Respectively.***—Where there are two ways to perform work, the one safe and the other not, it is the duty of a servant to adopt the safe way, if he knows of it, or, by the exercise of ordinary care, might know it. It is also the duty of the master to inform the servant of the safe way, and if he was not informed of it and did not know it, and could not have ascertained it by the exercise of ordinary care, and was injured in consequence of doing the work in the only way known to him, and that manner of doing it was not so obviously dangerous that a reasonably prudent man would not have undertaken it, the master is liable.
3. **MASTER AND SERVANT—*Risk in Doing Work—Reasonable Care of Servant.***—Although a servant may know that there is danger in doing the work assigned him in a particular way, yet if the danger was not so imminent that a reasonably prudent man would not have attempted it under the direction of his foreman, and the servant used such reasonable care as an ordinarily prudent man would have exercised, and was injured, then the master is liable.
4. **RAILROADS—*Operation of Switch at Roundhouse—Fellow-Servant Rule—Provision of Constitution and Statute.***—A servant whose duty it is to turn a turntable of a railroad for all engines coming in and going out of a roundhouse, and to throw the switch for the tracks in whichever way they are going, is engaged in the "physical operation of a switch" within the meaning of the constitution and statute abolishing the fellow-servant rule and qualifying the doctrine of assumed risk as to such an employee of a railroad company.

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5. INSTRUCTIONS—*Conforming to Alternative Theories.*—Where the evidence presents two theories of a case, upon one of which the defendant is liable and the other not, it is proper to instruct the jury upon the alternative theories.
6. RAILROADS—*Operating of Turntable in Only Known Way—Instructions.*—In an action by a servant against his master to recover for injuries received in the operation of a turntable, an instruction is erroneous which tells the jury that the plaintiff cannot recover if they believe that his injuries were due to the manner in which he attempted to operate the table, when it is manifest from the evidence that he acted under the orders and by the instruction of his superior, and managed the table in the only way known to him.
7. INSTRUCTIONS—*Jury Fully Instructed.*—It is not error to refuse further instructions when the instructions already given fairly and fully submit the case to the jury in all essential particulars.
8. APPEAL AND ERROR—*Assignment of Error—What Not Sufficient.*—A statement in a petition for a writ of error that "without discussing in detail the instructions asked for and refused by the court, it is submitted that they expressed correctly the several propositions stated in them, and that there was evidence supporting or tending to support them," is not a sufficient assignment of error, either under section 3464 of the Code, or Rule II of this court. A petition for a writ of error is in the nature of a pleading, and must state clearly and distinctly the errors relied on to reverse the judgment.

Error to a judgment of the Circuit Court of the City of Alexandria in an action of trespass on the case. Judgment for the plaintiff. Defendant assigns error.

*Affirmed.*

The opinion states the case.

Instruction No. 4 asked for by the defendant was amended by striking out the words in italics. As asked it was as follows:

"It is the duty of the master to exercise ordinary care to furnish its employees reasonably safe machinery and appliances with which to work. The duty is discharged if the em-

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ployer exercises ordinary care, although the machinery or appliances may not in fact be safe and (or) free from defects.

*"If the jury believe from the evidence, that the turntable of the defendant, in and about the operation of which the plaintiff claims he sustained the injuries complained of, was of modern pattern, design and construction, that it was a new turntable, having been recently procured by the defendant for use at Potomac yards, Alexandria county, Virginia, that it was purchased from reputable manufacturers, and that the defendant exercised ordinary care in the adoption, selection and purchase of said machine, and that the plaintiff's injuries arose from the fact that the said turn-table was not safe or free from defects or from the manner in which the plaintiff attempted to manage and operate the said turn-table, then their verdict must be for the defendant."*

Francis L. Smith, for the plaintiff in error.

Norton & Boothe, for the defendant in error.

WHITTLE, J., delivered the opinion of the court.

It is apparent that this case was tried upon the amended declaration to which there was no demurrer, and which states a good cause of action. Therefore we need not notice the first assignment of error which concerns questions raised by the demurrer to the original declaration. *Virginia Cedar Works v. Dalea*, 3 Va. App. 165, ante, p. 333, 64 S. E. 41.

The writ of error brings under review the judgment in behalf of Robert M. Cheshire, the defendant in error, against the Washington-Southern Railway Company, the plaintiff in error, in an action to recover damages for personal injuries sustained by him while in the service of the railway company.

The essential facts of the case about which there can be no

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dispute—at least, from the standpoint of a demurrer to the evidence—are as follows: The plaintiff was employed by the defendant as night operator of its turntable and switch at the freight yards near the city of Alexandria. He was directed to report for duty to Hammersly, the night round-house foreman, and was placed under his control for instructions and orders. The motive power of the turntable was compressed air; and when the plaintiff had been operating it for a few nights, he attempted to stop the table at one of the engine stalls to bring out the engine, but the lever “hung up,” and the machine continued to revolve, whereupon Hammersly, the foreman, jumped down into the pit over which the turntable revolved, and stopped it. Several days later the table again failed to respond to the lever, and Hammersly a second time went in the pit and cut off the air. On the last occasion he ordered the plaintiff to get into the pit with him, and instructed him how to stop the table from that position, at the same time remarking, “If you cannot do it, I will get somebody that will”—“that he was tired having to come out there every time the table ran off.” Hammersly testified that he stopped the table three times for the plaintiff.

Shortly after the last occurrence the plaintiff was again unsuccessful in the attempt to control the table with the lever, and jumped into the pit for that purpose, but slipped and was caught in the machinery, receiving the injuries of which he complains.

He had no notice or knowledge of any way of stopping the turntable other than that pointed out to him by Hammersly. It appeared, however, that between the table and round-house there was a stop-cock, by means of which the turntable could be controlled without risk or danger to the operator. Hammersly in his testimony admitted that he had never shown the plaintiff any other way to stop the machine when the lever failed him except to jump into the pit and cut off the air. He also testified that after the accident he saw his mistake and showed his

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men the valve near the round-house, and directed them not to go into the pit any more while the turntable was in motion.

The first assignment of error which demands our attention questions the correctness of instructions 2 and 3, given at the instance of the plaintiff, and objects to instruction 4 on the ground that there was no evidence to support it.

By instruction 2 the court told the jury that where there are two ways for a servant to perform his work, the one safe and the other unsafe, it is his duty to adopt the safe way, if he knows of it, or in the exercise of ordinary care might know of it. Also, that it is the duty of the master to inform the servant of the safe way; and if they believe from the evidence that the plaintiff was not so informed and did not know, and could not have ascertained the safe way of stopping the turntable by means of the stop-cock by the exercise of ordinary care, and that he was doing the work assigned him in the only way known to him, and that the manner of doing it was not so obviously dangerous that a reasonably prudent man would not have undertaken it, he is entitled to recover, unless he was guilty of negligence, other than the failure to use the cut-off, which contributed to the accident.

Instruction 3 told the jury that although they might believe from the evidence that the plaintiff knew there was some danger in jumping into the pit to shut off the valve and stop the turntable, yet if they further believed from the evidence that the danger was not so imminent that a reasonably prudent man would not have attempted it under the direction of his foreman, and that the plaintiff used such reasonable care as an ordinarily prudent man would have exercised and was injured, then he is entitled to recover.

The evidence was ample upon which to base these instructions, and they announce familiar principles of law, which are fully sustained by the decisions of this court. *Norfolk & Western Ry. Co. v. Cheatwood's Admx.*, 103 Va. 356, 49 S. E. 489; *Virginia Portland Cement Co. v. Luck's Admr.*, 103 Va. 427.



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49 S. E. 577; *C. & O. Ry. Co. v. Rowsey's Admr.*, 108 Va. 632, 62 S. E. 363.

Instruction 4 declares the duty of the master to use ordinary care to provide a reasonably safe place for the servant in which to perform the work required of him. The instruction was well within the evidence—notably that part of it which involved the failure of the foreman to advise the plaintiff of the presence of the stop-cock, and to inform him of its use.

It is pertinent here to observe that the plaintiff was engaged in the “physical operation of a switch” in addition to operating the turntable as an adjunct thereto, and is consequently expressly included in section 162 of the Constitution of Virginia abolishing the fellow-servant rule and qualifying the doctrine of assumed risk as to such employee of a railroad company, and also of the cognate provisions found in Va. Code 1904, section 1294k.

Hammersly testified that it was the plaintiff's duty to turn the table for all engines coming in and going out of the house, and to throw the switch for the tracks in whichever way they were going. It is clear, therefore, that the plaintiff comes within both the spirit and the letter of the foregoing provisions.

We may treat the next two assignments of error, both of which deal with the defendant's instructions, together. Of the twenty-two instructions asked for by the defendant, the court gave nine, modified two and refused eleven. We are told that the first instruction asked in behalf of the defendant was intended to present to the jury the theory that if the plaintiff slipped and *then* fell into the turn-table pit it was an accident for which the defendant is not liable. But the court modified the instruction by adding the words, “if the jury believe from the evidence that the plaintiff was not ordered into the turntable pit by his superior.”

The evident purpose of the court in modifying the instruction was to present alternative theories of the accident; upon

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one of which the defendant would be liable, and upon the other it would not be responsible for the injury. In this ruling there was no error, both theories having some evidence to sustain them.

The court gave that part of instruction four which dealt with the measure of the master's duty in the matter of supplying the servant with suitable machinery and appliances with which to work, but rejected the latter portion of the instruction which told the jury that if they believed from the evidence that the turntable was of modern pattern, recently purchased from reputable manufacturers, and that the defendant exercised ordinary care in the adoption and selection of the machine; and that the plaintiff's injuries were due to the fact that the turntable was not safe or free from defects, or to the manner in which the plaintiff attempted to operate it, then their verdict must be for the defendant. The amendment of the instruction was bad, if for no other reason, because it made the plaintiff, unqualifiedly, responsible for the method of operating the turntable, when it is apparent from the evidence that he acted under the orders and by the instructions of his superior, and managed the machine in the only way known to him.

The plaintiff in error, in its petition for the writ of error, says: "Without at this time discussing in detail the instructions asked on behalf of the defendant and refused by the court, it is submitted that they expressed correctly the several propositions stated in them, and that there was evidence supporting or tending to support them."

We are of opinion that in the instructions given by the court the case in all essential particulars was fairly and fully submitted to the jury. But even if the court erred in rejecting some of the defendant's instructions, the errors complained of are not sufficiently assigned by the language quoted, either under section 3464, Va. Code, 1904, or Rule II of this court. A petition for a writ of error is said to be in the nature of a pleading and must state clearly and distinctly the errors relied

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on to reverse the judgment. *Orr v. Pennington*, 98 Va. 268, 24 S. E. 928; *Hawpe v. Bumgardner*, 103, 93, 98, 48 S. E. 554.

The last assignment of error relates to the refusal of the court to set aside the verdict as contrary to the law and the evidence.

Without prolonging this opinion by a discussion of the evidence, we find it quite sufficient to sustain the verdict of the jury.

For the foregoing reasons, the judgment must be affirmed.

*Affirmed.*

Syllabus.

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**Mytherville.**

WHITE OAK COAL CO. v. CITY OF MANCHESTER.

June 10, 1909.

Absent, Cardwell, J.

1. **HIGHWAYS—Public Use—Streets—Legislative Control—Delegation of Control.**—The highways of the Commonwealth, whether urban or rural, belong primarily to the public, and the legislature has absolute dominion over them, and while the control of streets is commonly delegated to the municipalities in which they are located in such measure as the legislature sees fit to bestow, still the use of them remains in the public at large subject only to such limitations as the municipalities are authorized by law to impose.
2. **MUNICIPAL CORPORATIONS—Streets—License Tax on Vehicles—Rights of Non-Residents.**—It is a reasonable exercise of charter powers to license vehicles for a municipality to lay a license tax upon vehicles of residents thereof and upon persons residing outside of the corporate limits who employ their vehicles in furtherance of business and occupations carried on within the municipality, but to levy such tax on vehicles of non-residents, whose business or pleasure casually carries them into or through the municipality, would be in derogation of their reserved right to use the highways of the Commonwealth, and impose intolerable conditions upon the public, and lead to absurd results.
3. **MUNICIPAL CORPORATIONS—Control of Streets—Construction of Grant.**—The grant by the legislature of municipal control over streets must be strictly construed in the interest of common right.
4. **MUNICIPAL CORPORATIONS—Streets—License Tax on Vehicles—Non-Residents—Use of Streets—City of Manchester—Case at Bar.**—The sporadic act of hauling a single consignment of coal by a non-resident coal company from a railroad siding in the city of Manchester, over the streets of the city, to a customer out-

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side, is not carrying on such a business or occupation within the city as would subject the coal company to the license tax on vehicles imposed by the ordinance of the city.

Error to a judgment of the Corporation Court of the city of Manchester, affirming, on appeal, a judgment of the Mayor of said city, imposing upon the plaintiff in error a fine of \$10 and costs for employing wagons on the streets of said city without having first obtained a license therefor.

*Reversed.*

The opinion states the case.

*Page & Leary*, for the plaintiff in error.

*Charles L. Page*, for the defendant in error.

WHITTLE, J., delivered the opinion of the court.

The plaintiff in error, the White Oak Coal Company, is a corporation reengaged in business as a coal merchant at the city of Richmond, with its yards, offices and stables located in that city, where it pays a license tax on the wagons employed in its business. Having sold a consignment of coal to a customer in Chesterfield county, it caused the cars containing the coal to be stopped on a siding of the railroad company in the city of Manchester, and from that point proceeded to haul the coal in its wagons over the streets of the city to the place of business of the purchaser outside the city limits.

The charter of the city provides that "The council may grant or refuse licenses to owners or keepers of wagons, drays \* \* \* and other wheel carriages kept or employed in the city for hire, and may require the owners and keepers of wagons, drays and carts, using them in the city, to take out a license therefor, and may require taxes to be paid thereon, and subject the same to

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such regulations as they may deem proper, and prescribe fees and compensation."

The ordinance passed in pursuance of the foregoing provision declares, that "No wagon, dray \* \* \* or other wheel carriage shall be kept or employed in the city for hire, directly or indirectly, unless the owner or keeper thereof obtain a license therefor."

Upon the foregoing state of facts the plaintiff in error controverts the contention that the city had authority to impose a license tax on its wagons.

The general principle is well recognized, that the highways of the Commonwealth, whether urban or rural, belong primarily to the public; and that the absolute dominion over them is lodged in the legislature. It is true the control of streets is commonly delegated to the municipalities in which they are located, in such measure as the legislature sees fit to bestow. Nevertheless, the use of them remains in the public at large, subject only to such limitations as the municipalities are authorized by law to impose. *City of Richmond v. Smith*, 101 Va. 161, 43 S. E. 345; Elliott on Roads and Streets (2nd ed.), section 645. Moreover, it is the policy of the State that each locality shall bear the burden of maintaining its own highways.

Bearing in mind these principles, it is generally regarded as a reasonable exercise of such charter powers to lay a license tax upon vehicles of residents of the municipality, and upon persons residing outside of the corporate limits who employ their vehicles in furtherance of business and occupations carried on within the city. But to levy such tax on vehicles of non-residents, whose business or pleasure casually carries them into or through the city, would be in derogation of their reserved right to use the highways of the Commonwealth and impose intolerable conditions upon the public, and lead to absurd results.

As corollary to these well settled rules, the grant by the legislature of municipal control over streets must be construed strictly in the interest of common right.

## Opinion.

In *Bennett v. Birmingham*, 31 Pa. St. 15, discussing the power of cities to demand such exactions, the court says: "Such statutes and ordinances are contrary to the usual course of taxation, and embarrassing to the public, and ought to be strictly construed." In that case, by act of the legislature, the town council of Birmingham "were authorized to direct all owners of carts, wagons and other vehicles using the paved streets of said borough, to pay such moderate license for such use as they might by ordinance direct." The court held that this grant of power did not authorize the imposition of a tax on vehicles owned by non-residents and used in hauling goods and produce through the town from one adjacent township to another.

So also in the case of *Cary v. North Plainfield*, 49 N. J. L. 110, 113, 7 Atl. 42, 43 the court said: "The inconvenience attendant upon the exercise by every municipality in the State of the power of excluding from its limits all unlicensed vehicles engaged in transporting goods or passengers for hire, is manifest. Its legitimate operation would require the owners of such vehicles to obtain licenses not only from the authorities of the place where their business had its headquarters, but also from every neighboring town into which their casual engagements might call them, or else to unload their vehicles at the border line. A general law having effects so burdensome or so absurd is not to be anticipated, and only unequivocal language could convince a court that such legislation was intended. The statute now under review is not of this character. Its terms are satisfied by holding that license taxes are to be imposed only by that municipality in which *the business or occupation is carried on or conducted*." *Commonwealth v. Stodder*, 2 Cush. 562, 48 Am. Dec. 679; *St. Charles v. Nolle*, 51 Mo. 122, 11 Am. Rep. 440; *East St. Louis v. Bux*, 43 Ill. App. 276.

The same principle is recognized by this court in *Frommer v. City of Richmond*, 31 Gratt. 646, 31 Am. Rep. 746. Frommer lived outside of the city limits, but rented a stall in the

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city market, where he conducted his business as a butcher. He prepared his meat for market at his residence, and used his carts to haul it to his stall in the market. Upon these facts, the court held that Frommer was amenable to license tax on the carts thus used. The court rested its decision on the ground that the license tax was exacted for the privilege of using the carts on the streets of the city in pursuit of the owner's business in the city.

If the plaintiff in error had established a coal yard within the corporate limits of Manchester, the case would have been analogous to Frommer's case and ruled by it. But it is clear that the sporadic act of hauling a single consignment of coal from the siding in Manchester over the streets of the city to its customer on the outside was not carrying on such a business or occupation within the city as would subject the coal company to the license tax on vehicles imposed by the ordinance.

The conviction and fine imposed for the alleged violation of the ordinance was consequently illegal, and the judgment must be reversed and the proceeding dismissed with costs.

*Reversed.*



Syllabus.

**Mytherville.**

NEW YORK, PHILADELPHIA AND NORFOLK RAILROAD COMPANY  
v. WILSON'S ADMINISTRATOR.

June 10, 1909.

Rehearing refused June 24, 1909.

1. WITNESS—*Opinions—Matters of Observation—Experts—Minor Matters.*—A witness who was present and acquainted with the existing conditions may give his opinion as to how far, under those conditions, a signal given by a red lantern could have been observed on the occasion in question. This is not expert evidence, but a matter of common experience, the value of which is to be determined by the jury who have the witness before them and can judge of the value of his opinion. Such evidence should be received, but if rejected, is probably not of itself of sufficient importance to justify a reversal solely on that account.
2. RAILROADS—*Signals—Experts—Opinions.*—A witness who has been in the railroad business for a number of years as brakeman and engineer may give his opinion as to the use of danger signals on railroads, the use made of them, the noises made by some, the light shed by others, and the like.
3. APPEAL AND ERROR—*Objections to Evidence—Waiver.*—Objections to evidence will not be considered in this court, when the same facts were proved by another witness, without objection.
4. RAILROADS—*Duty to Employees—Apprehended Dangers—Signals—Failure to Observe.*—It is the duty of a railroad company to use reasonable care to give to employees operating its trains proper warnings of the dangers which threaten them. If that is done it has discharged its duty, and if, from any cause, the signal is not observed, it is no fault of the railroad company, and it is not liable for resulting injuries.
5. INSTRUCTIONS—*Two Theories of Case—Evidence to Support Each.*—When two theories of a case are presented by the evidence, upon

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one of which the jury has been sufficiently instructed, it is error to refuse an instruction based upon the other theory of the case, which, if sustained, would require a different verdict.

Error to a judgment of the Circuit Court of Northampton county in an action of trespass on the case. Judgment for the plaintiff. Defendant assigns error.

*Reversed.*

The opinion states the case.

After the evidence had been introduced, the plaintiff asked for the following instructions, which were given over defendant's objection:

“(1). The court instructs the jury, that if they believe from the evidence that Nelson, the flagman of train No. 1, went back a sufficient distance to have warned Parker, the engineer on train No. 49, by the use of torpedoes or fusees, in time for Parker to have stopped his engine and prevented the collision, and that the said Nelson could, in the exercise of ordinary care, have carried with him and used said torpedoes or fusees, but that he either did not carry them with him, or if he did, did not use them, and if he had done so, Parker would have stopped his engine in time to prevent the collision, and that his not doing so was a lack of ordinary care on his part, and was the proximate cause of the collision, then they will find for the plaintiff. The court further instructs you that the plaintiff in this case is entitled to recover, although they may believe that Parker was guilty of negligence contributing to the accident, if Wilson was not so guilty, and the brakeman was guilty as aforesaid.

“(2). The words ‘ordinary care’ as used in these instructions means such care as a man of ordinary prudence would have used under similar circumstances in view of the dangers incident to the service, but what could have been ordinary care under some circumstances might be negligence under other circumstances, and it is for the jury to decide from all the evidence whether ordinary care was used in this case.

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"(3). If the jury believe from the evidence that the plaintiff is entitled to recover, in estimating the damages the jury should find the sum with reference:

First. To the pecuniary loss of his mother and sisters, at a sum equal to the probable earnings of the deceased, considering his age, business capacity, experience, habits, energy and perseverance during his lifetime.

Second. They may consider the loss of his care, attention and society to his mother and sisters.

Third. They may add such sums as they may deem fair and just by way of solace and comfort to his mother and sisters, for the sorrow, sufferings and mental anguish occasioned by his death. The plaintiff in his declaration claims \$10,000 in damages, and the jury are authorized to award such sum as the evidence justifies, if any, not exceeding the sum so claimed by the plaintiff."

And, thereupon, the defendant, by counsel, asked the court to instruct the jury as follows:

"(A). The court instructs the jury, that in an action against a railroad company to recover damages for an injury negligently inflicted on a servant of the company, the burden of proof is on the plaintiff to establish the negligence of the defendant by affirmative evidence, which must show more than a mere probability of a negligent act. The evidence of negligence must not be left wholly to conjecture, and in determining whether or not an act or omission of the master was negligent, it must be borne in mind that the master (railroad company) is not compelled to foresee and provide against that which reasonable and prudent men would not expect to happen.

"(B). If the jury believe from the evidence that Daniel J. Parker, the engineer on train No. 49, was notified at Hallwood station, a station of the New York, Philadelphia and Norfolk Railroad Company, about twenty-five miles north of the place of the collision, between trains No. 49 and No. 1, at or about the hour of — o'clock A. M., on the 10th day of April, 1906, the

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day of the collision between said trains, both being south bound on the same track, a single track, by William D. Nelson, a flagman on train No. 1, to look out for his train No. 1, that it was running ahead of train 49, with a driving hot box, and that fireman George R. Wilson, of train 49, the plaintiff's intestate, was present and within the hearing of William D. Nelson when said Nelson gave this notice to the said Daniel J. Parker (the said engineer), and that train 1 left Hallwood station only about five minutes ahead of train 49, and that the weather was very thick and foggy, and that train 49 ran behind train 1, at a speed of about thirty to forty miles an hour, and if the jury further believe from the evidence that the plaintiff's intestate (George R. Wilson), fireman as aforesaid on train 49, did not keep a faithful and proper lookout with D. J. Parker, the engineer of train 49, for danger signals and obstructions on the said railroad track, in so far as he could in the discharge of his duty as fireman, then the said George R. Wilson, the plaintiff's intestate, was guilty of having participated in the negligence of said D. J. Parker, the engineer, should they believe Parker was in fact negligent, and the plaintiff is not entitled to recover in this action.

“(C). If the jury believe from the evidence that the plaintiff's intestate did not use ordinary care by keeping a faithful and proper lookout for danger signals on the right of way and track, then he contributed to his death, and is precluded from recovering in this action, although the defendant (company) may be chargeable with negligence also.

“(D). If the jury believe from the evidence that the death of the plaintiff's intestate (George R. Wilson) was caused by circumstances which show it was an accident pure and simple, which could not have been anticipated by any reasonable foresight on the part of the company, they must find for the defendant company.

“(E). The court instructs the jury that it is the duty of the railroad company to exercise reasonable care for the safety of its

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employees, but it is not bound to provide the latest inventions or the most newly discovered appliances. It is not bound to use more than ordinary care, no matter how hazardous the business may be in which the employee is engaged.

“(F). The court instructs the jury, that if they believe from the evidence that brakeman Nelson stopped train 49 at Hallwood the morning of the collision with his red lantern alone, without difficulty, during a fog, that when freight train No. 1 parted just before reaching Exmore the fog was no denser than it was at Hallwood when he flagged No. 49 with his lantern alone, he was not guilty of negligence in going immediately back and attempting to again flag No. 49 with his red lantern, provided the same was swung and used as a danger signal should have been swung or used.

“(G). The court instructs the jury, that flagman Nelson was in the exercise of reasonable and ordinary care in attempting to signal train 49 to stop with a red lantern alone immediately preceding the collision, if he had stopped the same train at Hallwood a short time before with the same lantern, provided the weather conditions, such as fog and light, were practically the same at both places at the time the red lantern was used to stop the train, provided the same was swung and used as a danger signal should have been swung or used.”

To the granting of which instructions, the plaintiff, by counsel, objected, and thereupon the court granted instructions A, B, D and E, as prayed for, but refused to grant instructions C, F and G, as prayed for, but gave instruction C modified as follows:

“(C, as given). If the jury believe from the evidence that the plaintiff's intestate did not use ordinary care by keeping a faithful and proper lookout for danger signals on the right of way and track, in so far as he could in the proper discharge of his duties as fireman, then he contributed to his death, and is precluded from recovering in this action, although the defendant (company) may be chargeable with negligence also, provided

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they believe from the evidence such a lookout would have prevented the accident.”

And refused to grant instructions F and G, to which action of the court in granting the instructions prayed for by the plaintiff, and in refusing to grant instruction C, as prayed for, and in giving the same as modified, and in refusing to give instructions F and G, as prayed for, defendant excepted.

*Thos. H. Wilcox and E. J. Spady*, for the plaintiff in error.

*G. S. Kendall, J. E. Heath and R. G. Houston*, for the defendant in error.

KEITH, P., delivered the opinion of the court.

Passenger train No. 49 of the New York, Philadelphia and Norfolk Railroad Company ran into the rear of a freight train on that road, the collision resulting in the death of Wilson, the fireman upon the engine of the passenger train, and this suit was brought by his administrator to recover damages. There was a verdict and judgment for the plaintiff. During the progress of the trial certain exceptions were taken to rulings of the court, which are now before us for review upon a writ of error.

The evidence tends to prove that, on the 10th of April, 1906, a freight train consisting of an engine and twenty cars was moving south upon the roadway of plaintiff in error. Near Hallwood station the engineer discovered that his engine had a hot box, and his flagman was at once dispatched to notify passenger train No. 49 of the fact. The flagman had instructions to flag the train, to stop it and to inform the engineer upon that train of what had occurred upon the freight train. The flagman went back a sufficient distance, and using a red lantern as a signal flagged passenger train No. 49, brought it to a stop and delivered his message. The proof is that at the time there

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was quite a heavy fog, but, notwithstanding that fact, the signal with the red lantern was observed and obeyed by the engineman upon passenger train No. 49. Both trains on this single track were moving southward in the direction of Cape Charles, the terminus of the road, and it appears from the evidence that the train dispatcher at Cape Charles notified the engineman on passenger train No. 49 of the trouble with respect to the hot box upon the freight train, and the telegram giving this information was found upon the person of Parker, the engineman, after his death, he also having been killed by the collision which subsequently occurred.

After leaving Hallwood, and as it approached Exmore, a station 29 miles distant, a coupling on the freight train gave way and the train parted. It was speedily halted, and the flagman, who was in the caboose, was at once sent to the rear to give warning of the situation. His testimony is that when he left his train and got upon the ground he could hear No. 49 approaching. He ran as rapidly as he could back along the railroad for a distance of eight telegraph poles, or 480 yards, waving his red lantern across the track, and continued to wave it until the passenger train had approached so nearly that he was compelled to stand aside to escape being run over. The engineer did not acknowledge his signal or diminish the speed of the train, but rushed by, with the result that his engine collided with the rear of the freight train, and both the engineman and his fireman were killed.

There is evidence tending to prove that both trains had been inspected that morning; that their couplings and appliances were such as complied with the rules of the Interstate Commerce Commission and with the rules in the United States for standard couplings; and that, so far as was disclosed by recent and careful inspection, all of these appliances were in good order.

The rules of the company prescribe that flags of the proper color must be used by day, and lamps of the proper color by

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night, or whenever from fog or other cause the day signals cannot be clearly seen; that red signifies danger; and is a signal to stop; that an explosive cap or torpedo placed on the top of the rail is a signal to be used in addition to the regular signals; that the explosion of one torpedo is a signal to stop, the explosion of two torpedoes not more than two hundred feet apart is a signal to reduce speed and look out for a danger signal; that a fusee is an extra danger signal, to be lighted and placed on the track at night, in cases of accident or emergency; that a train finding a fusee burning upon the track must stop, and not proceed until it has burned out; that a lamp swung across the track is the signal to stop; and rule 78 provides, that "all signals must be used strictly in accordance with the rules, and trainmen must keep a constant lookout for signals." Rule 99 provides, that "when a train stops or is delayed, under circumstances in which it may be overtaken by a following train, the flagman must go back immediately with danger signals a sufficient distance to insure full protection. When recalled, he may return to his train, first placing two torpedoes on the rail when the conditions require it."

When the flagman went back on this occasion, he had with him a red lantern, as already stated, and torpedoes, but no fusees. The evidence is that the passenger train was running at between thirty and forty miles an hour. At thirty-five miles an hour, the train would have covered the 180 yards between the point at which the flagman made his signal and the rear of the freight train in 28 seconds.

The first assignments of error are to the rulings of the court in admitting certain testimony over the objection of plaintiff in error, as set forth in bills of exceptions Nos. 1 and 2.

A witness, C. H. Ames, was introduced on behalf of the defendant, and testified as follows:

"Q. Did you get off the train when the accident occurred?

A. Yes, sir.

"Q. Was it foggy there? A. Yes, sir.



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"Q. Was it just as foggy as it was at Keller? A. It was later and lighter.

"Q. The same conditions prevailed there as at Keller? A. The day was lighter.

"Q. Was the fog as heavy? A. Yes, sir.

"Q. Was it possible with the conditions that prevailed at the place where the accident occurred to see any kind of light very far?"

To which question defendant, by counsel, objected; but the court overruled the objection and allowed the witness to answer the question.

"A. Do you want me to specify some distance?

"Q. We want you to specify how far you could see a light."

He was then asked: "Will you please state at what distance you think it possible to have seen the lanterns used ordinarily by the railroad company, if you know what they are, as signal lights?"

"A. I should not think you could see it very far—the length of the car."

To which ruling of the court in allowing the questions to be asked and answered in the connection in which they were asked, the plaintiff in error excepted.

The bill of exception assigns no reason why the answer should have been excluded. Its object was to get from the witness an opinion as to how far, under the conditions which existed, the signal given by a red lantern could have been observed on the occasion in question. This is not a matter of expert knowledge. It is a matter of opinion, it is true, resting on common experience, the value of which must be determined by the jury, which has the witness before it and can form some idea of the weight to be attached to his evidence. In this case, the witness was upon the train on the morning of the accident. He saw the fog and the lanterns, and was able to give some idea of the distance at which the light of the red lantern in use by railroads on such occasions could be seen.

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We think, therefore, that the questions and answers were proper; but even if they were not, we should be indisposed to attach to them such importance as to make them the ground of reversing the judgment.

The second bill of exceptions is to the testimony of James Driscoll. The questions which he was asked were as follows:

"Q. From your knowledge and experience as a railroad man, do you feel qualified to speak as to the running of trains and the use of signals? A. Yes, I think so.

"Q. I would ask you what are the danger signals ordinarily used by railroad companies? A. Red flag by day and red lamps by night, and also they use torpedo and fusee. The torpedo can be used in the day time and also at night, and the fusee especially goes at night.

"Q. What is a torpedo? A. It is something about the size of a silver dollar, and has two straps to it about two inches long of soft metal. I don't know what the metal is made of. In case of danger, this is a special danger signal used. This torpedo is placed on the rail. One means to stop still, and for the engine not to go any further. It explodes in a terrible way, and that means to stop there. Two placed one rail length apart is a signal to proceed on, and to look out, danger ahead.

"Q. How long does it take to fix or apply a torpedo to the rail? A. You can almost place it as quick as the hand can be used. The metal is very soft, and the rail has the over projection, and you slip it on as quick as that.

"Q. What is a fusee? A. It is a piece about that long, and it has an explosive to the end of it, and it has a piece of steel about that long. They are kept where you can put your hand on it, and you can strike it so, and you can throw it so (indicating), and it burns ten or fifteen minutes. It burns a large red light. The smoke goes up, and is a danger signal, and that means stop and not move until that burns out. That is another extra danger signal used by railroad men.

"Q. Did I understand you to state how high a fusee burns?

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A. It burns tremendous high, and the smoke casts a large red light. I could not tell just how many feet it would show in the elements from the ground up, but it is a tremendous big light."

To this examination plaintiff in error excepted, and assigns the ruling of the court upon it as error.

It appears that Driscoll had been in the railroad business for a number of years, as brakeman and engineer, and was therefore qualified to speak and to give his opinion upon the subjects with reference to which he testified. But even if this were not so, the same facts were proved, without objection, by another witness, and we are of opinion that this assignment of error is not well taken.

When the evidence was concluded, the defendant in error asked for certain instructions, all of which were given; and while they were excepted to in the trial court, there is no assignment of error with respect to them.

Plaintiff in error also asked for certain instructions, marked "A," "B," "C," "D," "E," "F" and "G." The court gave "A," "B," "D" and "E"; refused to give instruction "C" as asked for, but gave it with an amendment; and wholly rejected instructions "F" and "G."

Instruction "C," as asked for, told the jury, that if they believed "from the evidence that the plaintiff's intestate did not use ordinary care, by keeping a faithful and proper lookout for danger signals on the right of way and track, then he contributed to his death, and is precluded from recovering in this action, although the defendant company may be chargeable with negligence also." The court added to it these words: "provided they believe from the evidence such a lookout would have prevented the accident."

The fact that his intestate was injured does not entitle defendant in error to recover. He must show that the injury was the result of negligence upon the part of the railroad company. The duty of the railroad company was to use reasonable

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care to give proper warnings of the danger which threatened the train upon which plaintiff's intestate was an employee. If that was done, then it had discharged its duty, and if for any cause the signal was not observed, that was no fault of the railroad company. If the failure to observe the signal was due to inattention upon the part of plaintiff's intestate—to his failure to keep "a faithful and proper lookout," as it was his duty to do—of course, there could be no recovery. But suppose the railroad company discharged its duty, could it be made answerable to the plaintiff, although his intestate, without any dereliction of duty upon his part, failed to see, or was unable to see, a proper and sufficient signal of danger?

We think that instruction "C," as asked, correctly stated the law; that the proposition contained in the qualification attached to it had already been sufficiently covered by other instructions, and that attaching it to instruction "C" tended to mislead the jury, and was erroneous.

This brings us to consider instructions "F" and "G." It appears from the evidence and from the instructions asked and given at the instance of defendant in error, that the conflicting theories of plaintiff and defendant in the court below were as follows: The theory of plaintiff, defendant in error here, was that, under the circumstances as they existed immediately before and at the time of the collision, when the flagman went back up the track to stop passenger train No. 49 it was his duty to take with him not only the red lantern but torpedoes and fusees; to go back as far as he safely could under the circumstances, and attach a torpedo and a fusee to the track in the proper manner. This theory of the case is presented in instruction No. 1. The theory of the defendant, plaintiff in error here is that the danger signal provided by the rules and in customary use on such occasions is the red lantern at night; that the proper use of the torpedo and fusee is to put them upon the track as a warning to a following train when the flagman has been recalled by a signal from his own

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train; and this is the theory presented by Instructions "F" and "G."

It will be recalled that the testimony of the flagman tends to prove that he went as rapidly as possible to the rear, and as far as he could go with safety; that he waved his red lantern as a signal, as he had done a very short time before at Hallwood station; that the conditions at Hallwood and at Exmore were substantially the same; that he met the on-coming passenger train at a distance of 480 yards from the rear of the freight train; that it was running at a rate of 35 miles an hour; and that he had no time to put down a torpedo or a fusee. And when it is recalled that a train going at that rate of speed would cover the distance of 480 yards in 28 seconds, and that if he had stopped a sufficient length of time before meeting the passenger train to have attached the torpedo or fusee to the track, it would have resulted in his giving a signal at a distance short of 480 yards from the rear of the freight train by so much space as would have been covered by the passenger train while he was placing the torpedo or fusee; we cannot say that the flagman, confronted with these difficulties, judged unwisely in confining himself to giving the signal with the red lantern. As a matter of fact, he did not have the fusee with him, but that we presume does not affect the situation; for if that was, under the circumstances, the only proper signal to have been given, then he was not in the exercise of reasonable and proper care in not supplying himself with them.

As the court told the jury in instruction "E," it was the duty of plaintiff in error to exercise reasonable care for the safety of its employees; but it was not bound to use more than ordinary care no matter how hazardous the business in which the employee was engaged. There being evidence, then, tending to show that, under all the circumstances, a signal with a red lantern would have satisfied the obligation of plaintiff in error, the instructions in question should have been given.

In *Richmond Traction Company v. Martin's Admr.*, 102

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Va. 209, 45 S. E. 886, Judge Whittle says, that "where two theories of a case are presented by the evidence, upon one of which the jury has been sufficiently instructed, it is error to refuse an instruction based upon the other theory of the case, which if sustained would require a different verdict, or to add to such an instruction a qualification which would withdraw from the jury the consideration of the last mentioned theory."

And in *Richmond Passenger, &c. Co. v. Gordon*, 102 Va. 498, 46 S. E. 772, Judge Buchanan says: "Where there is evidence tending to prove that the injury sued for was caused by the concurrent and co-operative negligence of both plaintiff and defendant, and also evidence tending to prove that the defendant's negligence alone was the proximate cause of the injury, each party has the right to have his view or theory of the case presented to the jury by proper instructions for that purpose." See also Phillips on Instructions to Juries, sec. 101, and cases there cited.

We are of opinion that the judgment of the circuit court must be reversed, and a new trial awarded.

*Reversed.*

## Statement.

**Mytherville.****SAFFELL AND OTHERS V. ORR AND OTHERS.**

June 24, 1909.

1. **ACKNOWLEDGMENTS—Married Women—Substantial Compliance With Statute.**—A substantial compliance with the statute as to taking and certifying a married woman's acknowledgment to a deed, under the former statute on the subject, was all that was required. A literal compliance was not necessary. *Geil v. Geil*, 101 Va. 773, is affirmed.
2. **STARE DECISIS—Rule of Property—Sporadic Decision—Effect of Overruling.**—A sporadic decision, contrary to the weight of authority in the same jurisdiction, does not constitute a rule of property under the doctrine of *stare decisis*. The effect of overruling such a decision and refusing to abide by the precedent is retroactive, and makes the law at the time of the overruled decision as it is declared to be in the last decision.
3. **VENDOR AND PURCHASER—Innocent Purchaser—Defects in Chain of Title—Decrees Against Infants—Right to Show Cause.**—Where a party purchases land which is subject to the right of another, and that right is shown by the chain of title papers, the purchaser is charged with notice of all that the title paper or papers to which they refer may disclose upon complete examination, and this notice affects subsequent purchasers from him. A purchaser from one whose title depends on a decree taken against an infant is charged with notice of the infant's right to show cause against the decree, and hence is not an innocent purchaser so far as the rights of the infant, asserted within the statutory period, are concerned.

Appeal from a decree of the Circuit Court of Lee county.  
Decree for complainants. Defendants appeal.

*Affirmed.*

On April 7, 1883, David M. Orr and Rebecca, his wife.

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who were the joint owners of a tract of land, conveyed the same, for value, to their son, R. S. Orr. In May, 1883, David M. Orr died, surviving him his widow, Rebecca Orr, and two daughters and two sons. In 1888 R. S. Orr departed this life intestate, surviving him his widow, Lizzie Orr, and an infant daughter, Perdie Orr, and shortly after his death there was born of his wife, a son, R. S. Orr, being the second of that name. In 1888 suit was brought by Rebecca Orr against the personal representative of R. S. Orr (Sr.), Lizzie Orr, the widow, and Perdie Orr, infant heir of R. S. Orr (Sr.), to vacate the above deed of April 7, 1883. In 1890 a supplemental bill was filed for the purpose of bringing in the posthumous child, R. S. Orr (Jr.). Such proceedings were had in this suit as that said deed was vacated as to the said Rebecca Orr and she recovered one-half of the land thereby conveyed, and rents and costs. The other facts sufficiently appear in the opinion of the court.

*J. W. Orr and Irvine & Morison*, for the appellants.

*Pennington Bros. and Duncan & Sewell*, for the appellees.

CARDWELL, J., delivered the opinion of the court.

The pleadings and facts in this case necessary to be stated are as follows: On the 7th day of April, 1883, David M. Orr and Rebecca Orr, his wife, were joint owners of a certain tract of land situated in Lee county, Virginia, each owning an undivided moiety, and on that day, for a valuable consideration, they conveyed this land as a whole to R. S. Orr, their son, the deed being acknowledged by the grantors and certified as to Rebecca Orr, the wife, by two justices of the peace, as was then required by law, and the deed duly admitted to record.

David M. Orr departed this life in 1883, and R. S. Orr died in 1888 leaving a widow, Lizzie Orr, and one child, an



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infant, Perdie Orr. At the November rules, 1888, Rebecca Orr filed her bill in the Circuit Court of Lee county against E. W. Pennington, administrator of the estate of R. S. Orr, deceased, Lizzie Orr, and Perdie Orr, the object of which was to have set aside and annulled the deed of April 7, 1883, upon several grounds, among them that she, Rebecca Orr, had not acknowledged the deed as the law required.

The bill was answered by Pennington, administrator, by Lizzie Orr and by a guardian *ad litem* duly appointed on behalf of the infant, Perdie Orr; the answer of Lizzie Orr denying the allegations of the bill, and alleging the validity of the certificate of acknowledgment in question.

Upon the hearing of this cause, a decree was entered September 12, 1889, holding that the acknowledgment to the deed of Rebecca Orr was defective, setting aside the deed, and appointing a commissioner to report on the questions of rents, profits, etc.

On April 2, 1890, a supplemental bill was filed, which set forth that since the last decree another child, to-wit, R. S. Orr, had been born to Lizzie Orr, and this posthumous child was made a party defendant. On the same day an answer was filed by the guardian *ad litem* for this infant; and the administrator and the widow of R. S. Orr, deceased, filed their respective answers to the supplemental bill. Another decree was thereupon entered on that day, reaffirming the principles of the cause as they had been settled by the prior decree of September 12, 1889. A suspension of this last decree was asked for the purpose of appealing the case to this court, but the appeal was never prosecuted.

The result of the decrees mentioned was that Rebecca Orr recovered her half of the original tract of land which was made the subject of litigation, and, having had partition thereof made in the aforesaid cause, sold and conveyed the land she thus acquired to her son-in-law, S. H. Wells, but the deed thereto was not executed and delivered until February 27.

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1892; and Wells, by deed dated December 28, 1897, conveyed the same land to S. M. Saffell and A. B., his wife. The grantees took possession of the land at or about the date of that deed, and have remained in possession thereof.

On December 19, 1897, Perdie Orr, having a few months before attained her majority, for herself and as next friend of her brother, R. S. Orr, filed their bill of review against Saffell and wife, in which was set up the aforesaid chancery cause of *Rebecca Orr v. Pennington, Admr. &c.*, and the action taken in that cause, the sales and conveyances from Rebecca Orr to S. H. Wells, and from him to Saffell and wife, the decree of September 12, 1889, and the certificate of the justices of the peace attached to the deed of April 7, 1883, and alleged that the said decree was erroneous on its face, because the certificate of the acknowledgment of Rebecca Orr to that deed was a valid certificate; no other invalidity in the decree being alleged. The prayer was that the bill of review be allowed in the original cause above mentioned, that the said decree be reversed and set aside, and that the land be returned to the plaintiff.

At the March rules, 1908, Perdie Orr, for herself and as next friend for R. S. Orr, filed an amended bill of review, which repeats the allegations of the first bill, and, in addition to the matters in said first bill, sets out the decree of April 2, 1890, and alleges error in it as well as in the decree of September 12, 1889; the additional error alleged in the supplemental bill of review being a matter that need not be here stated. This amended and supplemental bill of review was answered by the defendants thereto, Clamanda Wells, Mary W. Wells, William A. Orr, and S. M. Saffell and wife, in all of which answers it was insisted that there was no error in the decrees complained of apparent upon the face of the record, and other matters set out not material to the question here presented.

Upon these pleadings a decree was entered on the 14th day of May, 1908, annulling and setting aside the decrees of September 12, 1889, and April 2, 1890, in so far as they affected

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the title of the plaintiffs, Perdrie and R. S. Orr, to the land in controversy, and appointing a commissioner to take an account of the rents, profits and permanent improvements, and from that decree this appeal was taken.

The question presented is whether the certificate of acknowledgment by Rebecca Orr to the deed of April 7, 1883, was valid or invalid; and this court is of opinion that this question is ruled by its decision in the case of *Geil v. Geil*, 101 Va. 773, 45 S. E. 325.

A comparison of the certificates of acknowledgment will disclose, that they are substantially the same.

In the *Geil Case*, the certificate was as follows: "We do further certify that Rebecca Geil, wife of Henry Geil, whose name is likewise signed to the writing hereto annexed bearing date as aforesaid, also personally appeared before us in our said county, and having the writing aforesaid fully explained to her, and being examined by us privily and apart from her said husband, she, the said Rebecca Geil, declared that she had willingly executed the same and does not wish to retract it."

The following is the certificate in the *Orr Case*: "We, John B. Pennington and W. R. Yearly, two justices of the peace, in and for the said county and State aforesaid, do certify that Rebecca Orr, wife of David M. Orr, whose names are signed to the foregoing deed, bearing date on the 7th day of April, 1883, personally appeared before us in our county and being examined by us privily and apart from her said husband and having said deed read and fully explained to her, acknowledged that she had willingly executed the same and does not wish to retract it."

The only differences in the two certificates are, first, the Geil certificate has the requisite of explaining the deed stated before the requisite of privy examination; and, second, in the certificate the word "declared" is used instead of the word

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"acknowledged"; where it is *vice versa* in the *Rebecca Orr Case*.

But counsel for appellants say that if the court adheres to its ruling in *Geil v. Geil*, they should prevail on this appeal for the reasons that appellants acquired their right to the land after the decisions of this court in the cases of *Hockman v. McClanahan*, 87 Va. 33, 12 S. E. 230, and *Clinch River Veneer Co. v. Kurth*, 90 Va. 737, 19 S. E. 878, that they are innocent purchasers for value without notice; and that, as those cases established a rule of property, neither the immediate grantee of Rebecca Orr nor his grantees, Saffell and wife, can be disturbed in their rights by reason of the decision of this court in *Geil v. Geil*, *supra*.

This contention is wholly without merit, for the reason that the court in *Geil v. Geil*, expressly held that the two cases relied on by appellants did not constitute a rule of property, and that the decision in the later case was in line with the weight of authority prior to *Hockman v. McClanahan*, and *Clinch River Veneer Co. v. Kurth*. The court sees no reason whatever for receding from either of those views. In the first place, the case of *Hockman v. McClanahan* held the certificate of the married woman's acknowledgment insufficient because the requisite "acknowledged the deed to be her act," appeared in the certificate before the privy examination; and in *Clinch River Veneer Co. v. Kurth*, the certificate failed to show that the married woman acknowledged the deed to be her act, and also that she had willingly executed the same. So that it will be seen that in each case the certificate was held invalid upon different grounds, and as a matter of fact both decisions recognized, as did the decision in *Geil v. Geil*, and many others that precede it, that all that was required in the certificate was a substantial compliance with the statute: therefore, the court, in its last decision (*Geil v. Geil*) was unquestionably right in holding that the cases of *Hockman v. McClanahan*, and *Clinch River Veneer Co. v. Kurth*, did not establish a rule of property,

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and that the rule of construction established by this court prior to the decisions in those cases was in accordance with the view the court took in *Geil v. Geil*.

We have taken occasion again to examine the "prior decisions" referred to in the last named case, and have found that they uniformly adhered to the rule that a substantial compliance with the statute as to taking and certifying a married woman's acknowledgment, as the law then stood, was all that was required; and in the cases in which the certificate of a married woman's acknowledgment was held invalid it was for the reason that there had not been a substantial compliance with the statute.

"The effect of overruling a decision and refusing to abide by the precedent there laid down is retroactive and makes the law at the time of the overruled decision as it is declared to be in the last decision." 26 Am. & Eng. Enc. L. 179.

There is a second reason why the contention of appellants, Saffell and wife, that they are protected in their right to hold the land in question by reason of the doctrine of *stare decisis*, and the fact that they are innocent purchasers from S. H. Wells who purchased of Rebecca Orr after the decision in *Hockman v. McClanahan*, cannot be sustained. We have seen that the doctrine of *stare decisis* is unavailing to these appellants, and their claim of being innocent purchasers for value without notice is equally as unavailing. They stand on no better footing than did S. H. Wells, under whom they claim, and Wells could occupy no higher ground than Rebecca Orr, his grantor. Had he, as was his duty, looked to the chain of title to the land which Rebecca Orr proposed to convey to him, he would have found the cause of *Rebecca Orr v. Pennington, Admr. &c.*, open, and in effect a pending cause in the Circuit Court of Lee county as to the infant defendants, Purdie and R. S. Orr, in which they had, under the existing statute (now section 3424 of the Code) until six months after they at-

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tained the age of twenty-one years to show cause against the decrees entered therein prejudicial to them.

It is an established rule in Virginia, that where a party purchases an estate which is subject to the right of another, and that right is shown by the chain of title papers, the purchaser is charged with notice of all that the title paper or papers to which they refer may disclose upon complete examination. *Effinger v. Hall*, 81 Va. 105; *Burwell v. Fauber*, 21 Gratt. 446; *Va. Iron, &c. Co. v. Roberts*, 103 Va. 679, 49 S. E. 984, and authorities there cited. Also *Blanton v. Rose*, 70 Ark. 415, 68 S. W. 674, where the court, considering a statute similar to section 3424 of our Code, *supra*, said: "A purchaser of land from one whose title depends on a decree taken against a minor is bound with notice of his right to show cause against the decree. This statute is notice to all the world in cases where it applies, and there can be no such thing as an innocent purchaser in such cases."

Not only was S. H. Wells bound by notice of the rights of appellees, but appellants claiming under him are so bound. That Saffell and wife had actual notice of appellants' rights when they purchased the land in question from Wells, is conclusively shown by the fact appearing in this record, that they took from Wells a bond of indemnity against loss or damage should the infant parties interested (appellees), when they arrived at the age of 21 years, assert their right to the land they (Saffell and wife) purchased of Wells or any part thereof, and also binding Wells to pay all costs of a suit by said infants for that purpose.

There are other questions raised and argued on this appeal, but in the view we have taken of the case it becomes unnecessary to consider them.

For the foregoing reasons, the decree appealed from must be affirmed.

*Affirmed.*

## Syllabus.

**Mytherville.**

## BAKER AND OTHERS v. BERRY HILL MINERAL SPRINGS CO.

June 10, 1909.

1. EQUITY PLEADING—*Multifariousness*.—In a general way, a bill is said to be multifarious which improperly joins entirely distinct and independent causes of action against one or more defendants, or impleads several defendants touching matters of a distinct and independent nature, but in cases involving the question of fraud, a very great latitude is allowed in pleading, both as to the circumstances charged and parties impleaded, provided one connected scheme of fraud be averred. If justice can be conveniently administered by the mode of procedure adopted, the objection of multifariousness will not lie, unless it is so injurious to one party as to render it inequitable to accomplish the general good at his expense.
2. EQUITY PLEADING—*Prayer for Alternative Relief—Demurrer*.—A bill is not objectionable on the ground that it contains a prayer for relief framed in the alternative. That is the common and correct practice where the exigencies of the case require it.
3. STATUTE OF FRAUDS—*Debt of Another—Original Promise*.—An agreement by a bank to discount notes with certain collateral, and to carry the loans until a third party can sell the collateral at a stated price and pay the notes from the proceeds, is an original undertaking on the part of the bank, and need not be in writing, although the discount is a part of a scheme on the part of such third person to defraud the makers.
4. PAROL EVIDENCE—*Fraud in Procurement of Contract*.—Parol evidence is always admissible to avoid a written contract procured by false and fraudulent representations.
5. RESCISSION—*Fraud—Ultra Vires Contract*.—In a suit against a corporation to rescind a contract on the ground of fraud in its procurement, if a proper case for rescission be made out, the fact that the contract is *ultra vires* and not enforceable is immaterial.

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Appeal from a decree of the Circuit Court of Culpeper county. Decree in favor of one of the defendants. Complainants appeal.

*Reversed.*

The opinion state the case.

*Rixey & Hiden, John S. Barbour and E. Hilton Jackson,*  
for the appellants.

*Grimsley & Miller, Waite & Perry and Edwin H. Gibson,*  
for the appellees.

WHITTLE, J., delivered the opinion of the court.

From the decree sustaining the demurrer of the Culpeper National Bank to the original and amended bills, and dismissing the cause as to that defendant, this appeal was allowed.

The case stated is as follows: The appellants, Kate M. Baker. Mary E. Middleton and Alice Tapp, were the owners of 1,000 acres of land in Culpeper county, known as Berry Hill, upon which property there is a valuable mineral spring. In September, 1902, the appellants sold and conveyed the spring with 169 3-4 acres of the farm attached to the Berry Hill Mineral Springs Company (a West Virginia corporation having an authorized capital of \$150,000, divided into shares of \$10 each) for 600 fully paid and non-assessable shares of stock, and \$45,000, evidenced by the company's three notes for \$15,000 each, payable, without interest, at 12, 18 and 24 months from date, secured by a trust deed as the first lien upon the property conveyed. At the date of the sale, there were trust deeds amounting to \$7,000 on the entire farm.

The company defaulted in the payment of these notes and other obligations, and thereupon S. R. Smith and W. E. Coons, who were two of the largest stockholders, devised a scheme for reorganizing the company in the same name but under a new



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charter to be obtained in the District of Columbia, with the ulterior purpose of fraudulently depriving the appellants of their lien, indeed of their entire holdings in the original company. The capital stock of the new company was to be \$150,000, one-third thereof 8% guaranteed preferred, and two-thirds common. In furtherance of their design, Smith and Coons called on the appellants at their home in the fall of 1904, and procured the surrender of their interest in the old company and the relinquishment of their lien upon the land for the unpaid purchase money notes by a series of false and fraudulent representations and promises. They represented and agreed that the new company would issue to appellants \$40,000 of its stock, fully paid and non-assessable, in the proportion of one-third preferred and two-thirds common, appellants to deposit in the treasury of the company \$7,500 of the new stock as indemnity against the trust deeds of \$7,000 which rested on the Berry Hill farm at the date of the original sale. Smith and Coons also agreed, on behalf of the new company and of themselves individually, to guarantee to appellants an 8% annual dividend on their preferred stock from January 1, 1906, until redeemed, and to redeem the stock at par within two years from that date. They further promised that no stock of the company should be sold at less than par, and none of it at any price until after the \$7,500 of stock deposited by the appellants with the company had been first disposed of and the proceeds applied in discharge of the trust deeds on the Berry Hill farm. They represented that Smith had bound himself for the term of ten years to furnish sufficient capital to finance the company and place it on a solid basis; and that within two years all the stock owned by appellants would either be redeemed by the company or purchased by Smith personally at par.

It is likewise distinctly alleged, as part of the plot to defraud the appellants, and as one of the principal inducements held out to them to enter into the proposed arrangement and to

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surrender their rights in the old company, that Smith, who was the president of the bank and expressly authorized to speak and contract for it, represented to appellants and promised and agreed that the bank would, as part of the plan of reorganization and to make it effective, carry for them until their stock was sold by Smith certain notes not exceeding \$4,500, to be secured by the delivery of so much of the stock of the company as the bank might require as collateral; that appellants should not be called on for payment of these notes, which were to be renewed from time to time and carried by the bank as renewals, until Smith disposed of the stock at par and with the proceeds took up the notes; that afterward in pursuance of the agreement, the bank discounted appellants' notes aggregating \$3,500 or \$4,000, and required the deposit of 600 shares of stock of the company as collateral security; that, at the time of discounting these notes and accepting the collateral, the bank had full knowledge of the promises and representations which had been made in its behalf in that regard and of all the details of the plan of reorganization of the old company, and of the fraudulent purpose of Smith and Coons in promoting the scheme, and that the discount of the notes under the agreement for renewals with the stock of the new company pledged as collateral was part and parcel of the contrivance to control the situation and to defraud the appellants and deprive them of their property; that appellants had no suspicion of the honesty of purpose and good faith of Smith and Coons until after the notes had been discounted, with the stock of the new company as security, and until after their stock, interests and securities in the old company had been surrendered and released. Then for the first time they were furnished with what purported to be copies of the minutes of both companies, showing what action had been taken in reorganizing the company, and discovered that they had been grossly misled, deceived and defrauded.

The original bill sets out categorically the representations,

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promises and undertakings of the defendants, Smith and Coons, by which the appellants were induced to fall into their fraudulent scheme, and the falsity thereof.

The bank refused to carry out its contract in regard to renewing the notes, and caused actions at law to be instituted thereon. The appellants offered to return, and tendered all the stock issued to them by the new company (except that held by the company as indemnity against the \$7,000 liens, and the 600 shares delivered to the bank), and the prayer of the bills is, that the contract thus fraudulently procured from them be rescinded, and that they be restored to their original rights; and, incidentally, an injunction is prayed for to restrain the bank from prosecuting the actions at law on the notes, and from disposing of the 600 shares of stock pledged to it as collateral security. Alternately, the bills pray that, in the event the contract cannot be rescinded, it may be reformed and executed by the parties and specifically enforced.

We have carefully considered all of the grounds of demurrer to these bills assigned by the bank, and shall now briefly address ourselves to such of them as demand notice.

In the first place, it is insisted that the original and amended bills, considered either jointly or severally, are multifarious.

In a general way a bill may be said to be multifarious when it improperly joins entirely distinct and independent causes of action against one or more defendants, or impleads several defendants touching matters of a distinct and independent nature. Story's Eq. Pl., sec. 271.

Tested by that rule, these bills are not amenable to objection. It is true the alleged fraudulent scheme for the reorganization of the old company involves numerous incidents, but they all constitute parts of a common and connected plan on the part of the projectors to defraud the appellants and appropriate to appellees' use the holdings of appellants in the original company.

"In cases involving the question of fraud, a very great lati-

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tude is allowed in pleading, both as to the circumstances charged and the parties impleaded, provided one connected scheme of fraud be averred. If justice can be conveniently administered by the mode of procedure adopted, the objection of multifariousness will not lie, unless it is so injurious to one party as to render it inequitable to accomplish the general good at his expense." *Garret v. Finch*, 107 Va. 25, 27, 57 S. E. 604, 1 Va. App. 150; *Jordan v. Liggan*, 95 Va. 616, 29 S. E. 330.

Nor are the bills objectionable on the ground that they contain a prayer for relief framed in the alternative. That is common and correct practice where the exigencies of the case require it. *Garrison v. Hall*, 75 Va. 150; *Bank v. Thornton*, 83 Va. 157, 2 S. E. 193; *Nunnally v. Strause*, 94 Va. 255, 26 S. E. 580.

Again, the objection that contrary to the statute of frauds the bills seek to charge the bank for the debt, default, or misdoings of Smith without a promise in writing, proceeds upon a misconception of the allegations. The agreement of the bank was charged to be original and not collateral, and its undertaking was separate and distinct from that of Smith. The bank was to discount certain notes for appellants with part of their stock pledged as collateral for the loans, and to carry the loans upon renewals until Smith sold the stock and paid the notes with the proceeds.

"Nobody else had assumed any undertaking *similar* to that of the bank. Its undertaking could not be a collateral promise." *Merritt v. Inglesby, Trustee*, 28 Vt. 157.

The authorities recognize the distinction between promises which are direct and original, though subsidiary or secondary to the principal promise, and such as are collateral merely. *D'Wolf v. Raband*, 1 Pet. 476, 500, 7 L. Ed. 227; Brown on Stat. of Frauds (4th ed.), sec. 175.

Another ground of demurrer relied on is, that the bills set up a parol agreement in conflict with and in contradiction of

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the written agreement. The notes held by the bank, it is said, are written promises, absolute on their face, to pay specific amounts on days certain and without condition; that the contemporaneous parol agreement alleged in the bills is, that these notes were not to be paid at maturity but were to be renewed from time to time until paid from the proceeds of sale of the hypothecated stock.

The proposition is founded upon the parol evidence rule, that a contract in writing complete on its face cannot be altered or contradicted by such evidence of an inconsistent agreement previously or contemporaneously made. But there is a well recognized exception to the general rule within which this case falls, namely, that when the written contract is procured by false and fraudulent representations parol evidence is always admissible to avoid it.

The exception is thus stated in *Clinch Valley Coal & Iron Co. v. Williams*, 180 Pa. 165, 36 Atl. 737, 57 Am. St. 626:

"The execution of a contemporaneous parol agreement between the parties, under the influence of which a note or contract has been signed, which is violated as soon as it has accomplished its purpose in securing the execution of the paper, may always be shown where the enforcement of the paper is attempted. It is a plain fraud to secure the execution of an instrument by representations as to the manner in which payment shall be made, differing in important particulars from those contained in the paper, and, after the paper has been signed, attempt to compel literal compliance with the terms, regardless of the contemporaneous agreement without which it never would have been signed at all."

So, in *Smith on the Law of Fraud*, section 265, it is said: "Parol testimony is admissible to show that the execution of a written contract was brought about by fraudulent representations. Such evidence as will lay the foundation for an action for deceit or a ground for the rescission of the contract is always receivable, although it may consist of oral representations."

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*Cummings v. Cass*, 52 N. J. L. 77, 18 Atl. 972; *Goodwin v. Horne*, 60 N. H. 485; *Langlely v. Rodriguez*, 122 Cal. 980, 55 Pac. 406, 68 Am. St. 70, 72; *McLean v. Life Ins. Co.*, 29 Gratt. 361; *Nash v. Fugate*, 32 Gratt. 595, 34 Am. Rep. 780.

The last ground of demurrer which we shall notice denies the power of the bank, under the revised statute of the United States, known as "The Statute Controlling National Banks," to make or authorize the contract or representations alleged in the bills. Assuming, only for the purposes of this assignment however, the correctness of that construction of the Act of Congress the contention loses sight of the fact that the primary purpose of the suit is to rescind and not to enforce the alleged *ultra vires* contract. If, therefore, at the hearing on the merits, the appellants shall make out a proper case for rescission on the ground of fraud, the fact that the contract is *ultra vires* and not enforceable becomes immaterial.

For these reasons, the decree appealed from must be reversed, the demurrer of the Culpeper National Bank to the original and amended bills overruled, and the cause remanded to the circuit court for further proceedings to be had therein not in conflict with the views expressed in this opinion.

*Reversed.*

## Syllabus.

## Mytherville.

BRANCH v BUCKLEY AND OTHERS.

June 10, 1909.

Absent, Keith, P.

1. EQUITY PLEADING—*Amendments*.—The question of amending pleadings in chancery is largely in the discretion of the trial court. In the case in judgment there is nothing in the character of the amendments, nor the circumstances under which they were made, that shows that the discretion of the trial court was improperly exercised.
2. EQUITY PLEADING—*Allegations of Actual Fraud—Constructive Fraud*.—Although a bill alleges actual fraud and contains a special prayer for relief on that ground if the facts alleged also make out a case of constructive fraud and these facts are established, relief may be afforded on the latter ground..
3. FRAUD—*Fiduciary Relations—Advantage—Influence*.—Wherever a fiduciary relation exists as a fact between persons, and confidence is reposed on the one side, and there is a resulting superiority and influence on the other, and the inferior is induced by the superior to transfer to the latter valuable property without consideration, or upon an inadequate consideration, such transfer will be set aside by a court of equity. Such a transaction will not be sustained unless the trust relation was for the time being completely suspended, and the inferior acted throughout upon independent advice, and upon the fullest information and knowledge.
4. FRAUD—*Ratification*.—When the original transaction is infected with fraud, the confirmation of it is so inconsistent with justice, and so likely to be accompanied by imposition that courts watch it with the utmost strictness, and do not allow it to stand but upon the clearest evidence.
5. FRAUDULENT CONVEYANCE—*Ratification—Receipt of Money—Knowledge of Fraud*.—The receipt of money under a contract voidable for fraud will not be deemed a ratification by the defrauded

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party, when it does not appear that he had become, or ought to have become, fully aware of the imperfections of the transaction and of his right to impeach it, and that in receiving the payment he acted deliberately, and with the intention of ratifying or confirming it. In the absence of facts or circumstances showing this, no act of confirmation, however formal, would be effectual.

6. **FRAUD—Suit to Avoid—Promptness—Acquiescence.**—A party having the right to impeach a transaction for fraud, must do so in a reasonable time, but what is a reasonable time must be determined by the facts and circumstances of the particular case. To fix acquiescence on a party it should unequivocally appear that he knew the fact upon which the supposed acquiescence is founded and to which it refers.

Appeal from a decree of the Chancery Court of the city of Richmond. Decree for complainants. Defendant appeals.

*Affirmed.*

The opinion state the case.

*Bev. T. Crump* and *A. W. Patterson*, for the appellant.

*McGuire, Riely & Bryan*, for the appellees.

BUCHANAN, J., delivered the opinion of the court.

The record in this appeal is large and the briefs very long, but the principles of law involved are few and pretty well settled.

While the bill and amended bills made a case of actual fraud, and contained a special prayer for relief on that ground, the facts alleged, in the opinion of the trial court, also made out a case of constructive fraud which entitled the complainants to the relief granted on that ground. Without deciding whether or not a case of actual fraud was proved, the trial court held that the case of constructive fraud was sustained by the proof, and set aside the conveyances and power of attorney



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whose validity was attacked by the complainants' pleadings, and remitted the parties in interest to their rights as they were prior to the execution of the papers which were held to be invalid. From that decree this appeal was taken.

The action of the court in permitting the amended and second amended bills to be filed is assigned as error.

As has been often held by this court, the question of amending pleadings in chancery is largely in the discretion of the trial court. There is nothing in the character of the amendments made in this case, nor in the circumstances under which they were made, that shows that the discretion of the trial court was improperly exercised. See *Kelly v. Gwathkin*, 108 Va. 6, 2 Va. App. 19, 60 S. E. 749; *Tidball v. Bank*, 100 Va. 741, 42 S. E. 867; *Glenn v. Brown*, 99 Va. 322, 38 S. E. 189; *Alsop, Mosby & Co. v. Catlett*, 97 Va. 364, 34 S. E. 48.

Another error assigned is that the matters decided by the trial court were not put in issue, prayed for in the complainants' pleading, or established by the testimony.

It appears from the allegations of the complainants' pleadings that at the time of the transactions sought to be set aside as fraudulent, Miss Bulkley, the complainant, was over seventy-eight years of age, and a resident of Southport, Connecticut, but was then on a visit in Richmond, Virginia, at No. 109 East Franklin Street, the home of William R. Branch, her nephew, the appellant. It further appears that she had come to Richmond a few days before and very soon after the death of her sister, Mrs. Currant, who owned the house in which the appellant resided, and with whom he lived at the time of her death. Upon this house the complainant had a lien for money loaned her sister in the year 1870, amounting, principal and interest, to about \$14,500, created by deed of trust; that Mrs. Currant had left a will in which it was provided among other things that the appellant, who was her executor, should sell the said house and lot, pay in full the debt due the complainant and secured thereon out of the proceeds of sale, turn the resi-

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due thereof into the general estate of the testatrix of which the appellant and the complainant were the legatees, after the payment of testatrix's debts and the other legacies and gifts provided for by her will; that on the night of the 27th of November, 1903, the appellant came home accompanied by Norvelle L. Henley, an attorney from Williamsburg, where the appellant carried on business; that the complainant was given to understand that the presence of the attorney was to prepare papers carrying into effect an arrangement talked of by her and the appellant by which the appellant as executor and trustee, was to convey to her the house and lot upon which the debt was secured being about equal in value to her debt, instead of selling it and satisfying her debt, and she was to lease the property to the appellant for \$500 per year, payable quarterly, the lessee to pay the taxes and keep the property in repair; that she did execute certain papers which she thought, and which she was given to understand by the appellant, were to carry their agreement into effect; that a short time afterwards she returned to her home in Connecticut; that in December, 1905, she was informed that the transaction which she had entered into and the papers which she had signed on the night of the 27th of November, 1903, were not such as she thought they were, but she was not convinced of this until she came to Richmond several weeks afterwards and made an examination of the records in the clerk's office of the chancery court of that city, where she found on record a deed from the appellant as substituted trustee and executor of Mrs. Currant conveying to the complainant the said house and lot, dated November 27, 1903, for the consideration of \$14,510, a deed from herself to the appellant dated November 27, 1903, conveying to the appellant the said house and lot for the consideration of \$5.00 and love and affection; a power of attorney from her to Norvelle L. Henley, dated November 27, 1903, authorizing him to release the said deed of trust on the Franklin street house and lot; and a deed of trust from the appellant

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and wife to Norvelle L. Henley, trustee, dated November 28, 1903, which conveys to the said trustee the Franklin street property to secure to the complainant the payment of \$125 every three months during her life; that all of these papers were recorded on the same day—the 28th of November, 1903—and were delivered to the appellant on the 3rd of the following December by the clerk; that none of these papers were ever in the possession of the complainant, except the deed of trust to Norvelle L. Henley, trustee; that while that paper was delivered to her by appellant she had never examined it, having implicit confidence in the appellant, until in December, 1905, when she was informed that the transactions of the night of November 27, 1903, were not what she thought they were.

After making other allegations as to the conduct of the appellant, showing if true fraud in fact, she charges in her pleadings that the said deed conveying the Franklin street house and lot to the appellant and all the transactions based thereon, were fraudulent.

Copies of the deed of trust securing the complainant's debt on the Franklin street house and lot, of the will of Mrs. Curren, of the conveyance of the appellant as substituted trustee and executor, conveying the same property to the complainant, of the power of attorney authorizing the trust to be released, of the conveyance of the complainant to the appellant of the trust subject, and of the deed of trust executed by the appellant and his wife to secure the payment of the \$125 every three months to the complainant during her life, are filed as exhibits in the cause.

The fiduciary relation existing between the appellant and complainant at the time the papers whose validity is assailed were executed, as charged in the complainant's pleadings, clearly appears from the record. Under well established principles of equity, independent of the question of actual fraud, transactions between parties occupying the relation to each other which existed between the appellant and complain-

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ant at the time the former acquired title to the trust subject are at least *prima facie* fraudulent.

Perhaps the doctrine in this class of cases is as clearly stated by Mr. Pomeroy as can be found in either text-writers or decisions. In section 956 of his work on Equity Jurisprudence, he says: "The doctrine to be examined arises from the very conception and existence of a fiduciary relation. While equity does not deny the possibility of valid transactions between the two parties, yet because every fiduciary relation implies a condition of superiority held by one of the parties over the other, in every transaction between them by which the superior party obtains a possible benefit, equity raises a presumption against its validity, and casts upon that party the burden of proving affirmatively its compliance with equitable requisites, and of thereby overcoming the presumption. One principle underlies the whole subject of its application, and this principle may be stated in a negative and in an affirmative form. Its negative aspect cannot be better expressed than in the following language of a most able judge: 'The broad principle upon which the court acts in cases of this description is that wherever there exists such a confidence, of whatever character that confidence may be, as enables the person in whom confidence or trust is imposed to exert influence over the person trusting him, the court will not allow the transaction between the parties to stand, unless there has been the fullest and fairest explanation and communication of every particular resting in the breast of the one who seeks to establish a contract with the person so entrusting him.' The principle was affirmatively stated with equal accuracy in the same case on appeal, as follows: 'The jurisdiction exercised by courts of equity over the dealings of persons standing in certain fiduciary relations has always been regarded as one of a most salutary description. The principles applicable to the more familiar relations of this character have been settled by many well known decisions, but the courts have always been careful not to fetter this useful

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jurisdiction by defining the exact limits of its existence. Wherever two persons stand in such relation that while it continues confidence is necessarily reposed by one and the influence which naturally grows out of that confidence is abused, or the influence is exerted to obtain an advantage at the expense of the confiding party, the person so availing himself of his position will not be permitted to retain the advantage, *although the transaction could not have been impeached if no such confidential relation had existed.* \* \* \* It is settled by an overwhelming weight of authority, that the principle extends to every possible case in which a fiduciary relation exists *as a fact*, in which there is confidence reposed on one side and the resulting superiority and influence on the other. The relation and the duties involved in it need not be legal; it may be moral, social, domestic or merely personal."

In section 957 he says: "There are two classes of cases to be considered which are somewhat different in their external forms, and are governed by different special rules, and which still depend upon the same general principle. The first class includes all those instances in which the two parties consciously and intentionally deal and negotiate with each other, each knowingly taking a part in the transaction, and there results from their dealing some conveyance, or contract, or gift. To such cases the principle literally and directly applies. The transaction is not necessarily voidable, it may be valid; but a presumption of its invalidity arises, which can only be overcome, if at all, by clear evidence of good faith, of full knowledge, and of independent consent and action. The second class includes all those instances in which one party purporting to act in his fiduciary character, deals with himself in his private and personal character, without the knowledge of his beneficiary, as where a trustee or agent to sell sells the property to himself. Such transactions are voidable at the suit of the beneficiary, and not merely presumptively or *prima facie* invalid. Nevertheless this particular rule is only a necessary

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application of the single general principle. The circumstances show that there could not possibly be the good faith, knowledge and free consent required by the principle, and therefore the result, which is a refutable presumption in the first class of transactions, becomes a conclusive presumption in the second class."

The rule governing the second class of cases was applied in *Harrison, &c. v. Manson*, 95 Va. 598, 29 S. E. 420, and *Smith, &c. v. Miller*, 98 Va. 535, 37 S. E. 10, where it was held that a trustee cannot purchase directly or indirectly at his own sale, and that the validity of such a sale does not depend upon its fairness, but the sale is voidable, and when attacked must be set aside, although the price was fair or the best to be had or the motive pure.

The most favorable light to the appellant in which this case can be considered is that it belongs to the first class described by Mr. Pomeroy. In reference to that class he says, in section 958: "A purchase by a trustee from his *cestui que trust*, even for a fair price and without any undue advantage, or any other transaction between them by which the trustee obtains a benefit is generally voidable and will be set aside on behalf of the beneficiary; it is at least *prima facie* voidable upon the mere facts thus stated. There is, however, no imperative rule of equity that a transaction between the parties is necessarily, in every instance, voidable. It is possible for the trustee to overcome the presumption of invalidity. If the trustee can show by unimpeachable and convincing evidence that the beneficiary being *sui juris* had full information and complete understanding of all the facts concerning the property and the transaction itself, and the person with whom he was dealing, and gave a perfectly free consent, and that the price paid was fair and adequate, and that he made to the beneficiary a perfectly honest and complete disclosure of all the knowledge or information concerning the property possessed by himself, or which he might, with reasonable diligence, have possessed, and

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that he has obtained no undue or inequitable advantage, and especially if it appears that the beneficiary acted in the transaction upon the independent information and advice of some intelligent third person, competent to give such advice, then the transaction will be sustained by a court of equity. The doctrine is enforced with the utmost stringency when the transaction is in the nature of a bounty conferred upon the trustee—a gift or benefit without full consideration. Such a transaction will not be sustained, unless the trust relation was for the time being completely suspended, and the beneficiary acted throughout upon independent advice, and upon the fullest information and knowledge.” See in addition to the numerous cases cited in the notes to that section of Pomeroy the following authorities: *Michoud v. Girod*, 4 How. (U. S.) 556, 11 L. Ed. 1076; *Bresee v. Bradford*, 99 Va. 331, 38 S. E. 196; Perry on Trusts, sections 194, 195; Lewin on Trusts, p. 467; notes to *Fox v. Mackreth*, 1 White & Tudor’s Lead. Cas. in Eq., Pt. 1, 188.

Applying these principles of law to the case made by the pleadings and proof, it clearly appears that the appellant was guilty of constructive fraud in the transaction sought to be set aside.

The material facts of the case in this aspect of it are succinctly stated by the learned judge of the chancery court in his opinion filed in the case, and the statement is fully sustained by the record: He says: “William R. Branch was the trustee for his aunt, Miss Bulkley, under the will of Mrs. Curran, her sister, who had recently died. By the terms of the will he was required to sell the property now in dispute and from the proceeds to pay to Miss Bulkley the amount due to her under the Sherwood deed of trust of 1870, which rested upon the very property in question. After the payment of this amount to Miss Bulkley, and also after the payment of certain legacies, Miss Bulkley and Branch were made the residuary legatees. While the completion of the transaction covered

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parts of two days, yet it was all one transaction. Branch obtained the property by giving to Miss Bulkley a deed from himself as executor of Mrs. Currant and taking back from her a deed to himself for the property. The consideration that he paid or agreed to pay to Miss Bulkley was inconsiderable and wholly inadequate; but whether the transaction be regarded as based on a valuable consideration alone, or as a bounty, or as partly based on each, it is equally vulnerable, even if Miss Bulkley did have knowledge of what she was doing. Branch apparently regarded the transaction as a sale for valuable consideration, because he charged his full commissions on the sale, one-half of which he charged against Miss Bulkley as a residuary legatee. She was a very old woman at the time, and had no adviser whatever. She was a resident of a distant State and was here at the time, a visitor in Branch's house, and very much under his influence. She had great confidence in him. The papers, after being drawn by Branch's attorney, were not presented to her to read at her leisure, so as to give her, in any event, full opportunity to consider the nature and propriety of the transaction, but were immediately signed by her at Branch's request. The transaction was a very hasty one. There is doubt as to the soundness of Miss Bulkley's physical condition at the time; her signature, usually very clear and steady, was on this occasion very tremulous and uneven. She executed and delivered to Branch on the evening of November 27, 1903, a deed and power of attorney, which on their face turned over to him a very large amount of her property, and the deed of trust by which she was to be secured a certain small life-annuity was not prepared until the next day, and the draft of it was never submitted to her. She appears to have been ready to execute without question any papers that Branch desired."

But it is insisted by the appellant, that even if the transaction was voidable at the time it was entered into, the complainant has no right to have it avoided because of her delay in



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instituting her suit, and acquiescence in, if not actual confirmation of, the transaction.

When the original transaction is infected with fraud, the confirmation of it, as was said by this court in *Wilson v. Carpenter*, 91 Va. 183, 192, 21 S. E. 243, 50 Am. St. Rep. 824, is so inconsistent with justice and so likely to be accompanied by imposition, that courts watch it with the utmost strictness, and do not allow it to stand but upon the clearest evidence.

In the note to *Fox v. Mackreth*, 1 White & T. Lead. Cas. Pt. 1, p. 237, it is said, that "while a *cestui que trust* may confirm an invalid sale so that he cannot afterwards set it aside, yet in order to constitute a valid confirmation a person must be aware that the act he is doing will have the effect of confirming an impeachable transaction." Numerous cases are cited to sustain this statement. See *De Montmorency v. Devereux*, 7 C. & F. 188, and n. 1; *Cockereil v. Cholmely*, 1 Russ. & M. 418, 425; 1 Sugden on Vendors, p. 253.

The only evidence that tends to show an act of confirmation in this case is the reception of the rent or annuity of \$500 in quarterly installments. On the checks given by the appellant to the complainant in making these payments, and upon the receipts he prepared for her to sign, were written in very small letters some explanatory words, as "for payment due (date) on deed of trust on 109 E. Franklin street." There is nothing in the record to show that she read, or if she read, that she understood these explanatory words. She was entitled to the \$500 in quarterly payments as rent for the house, as she understood the transaction, according to her contention, and may have received the money paid her with that understanding. But suppose she knew the nature of the transaction sought to be set aside when she received such payment, it does not appear that she had become, or ought to have become, fully aware of the imperfections of the transaction and of her own right to impeach it, and that in receiving the payment she acted deliberately and with the intention of ratifying or confirming it.

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In the absence of facts or circumstances showing this, no act of confirmation however formal, would be effectual. See 2 Pom. Eq. Jur. sec. 964; note to *Fox v. Mackreth*, *supra*, p. 237.

Neither do we think that the complainant had lost her right to impeach the transaction by acquiescence or delay. While it is true that a party who has the right to impeach such a transaction must do so within a reasonable time, what is a reasonable time is to be determined by the particular facts and circumstances of each case. See 2 Pom. Eq. Jur. sec. 965; note to *Fox v. Mackreth*, *supra*, p. 236, and cases cited; *Newcombe v. Brooks*, 16 W. Va. 32 (Green, J.)

It is said in the note to *Fox v. Mackreth*, and is sustained by the cases cited, that "acquiescence for a long time in an improper sale will disable a person from coming into court of equity to set it aside \* \* \*. But to fix acquiescence upon a party it should unequivocally appear that he knew the fact upon which the supposed acquiescence is founded and to which it refers." And these statements are sustained by numerous cases cited, among them *Pendall v. Ervington*, 10 Vesey, at p. 488; *Charles v. Trevelyan*, 11 C. & F. 714, 740; 1 Sugden on Vendors, p. 252-3, and cases in note 1.

Very soon after the transaction involved in this case was entered into, the complainant, who was quite an old woman, returned to her home in Connecticut. Conceding that she knew what the transaction was, it does not appear that she knew or ought to have known that it was of a character that she could impeach until shortly before she instituted her suit. The appellant is still in the possession of the property without any material change in it, and it does not appear that any prejudice has or will result to the appellant by reason of the complainant's conduct or delay in asserting her rights.

We are of opinion, therefore, that there is no error in the decree appealed from to the prejudice of the appellant, and that it should be affirmed.

*Affirmed.*

# CRIMINAL CASES.

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## Richmond.

STANLEY V. COMMONWEALTH.

December 3, 1908.

1. CRIMINAL LAW—*Writ of Error—Verdict of Conviction—Conflicting Evidence.*—A verdict of conviction of crime cannot be set aside by this court as contrary to the evidence where the evidence is conflicting on material points.
2. CRIMINAL LAW—*Views—Object—Discretion of Trial Court.*—The purpose of a view is not to supply evidence, but to enable the jury to apprehend it; and whether a view shall be granted or refused lies largely in the discretion of the trial court whose judgment on the question will not be reversed unless plainly wrong.

Error to a judgment of the Circuit Court of Franklin county on an indictment for murder.

*Affirmed.*

The opinion states the case.

*Dillard & Lee*, for the plaintiff in error.

*Robert Callett*, Assistant to the Attorney General, for the Commonwealth.

WHITTLE, J., delivered the opinion of the court.

The plaintiff in error, Arthur Stanley, was found guilty

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by the jury of murder in the second degree, and, in accordance with the verdict, was sentenced to confinement in the State penitentiary for the term of six years.

He admits the homicide, but insists that the killing was done in self-defense.

Regarded as upon a demurrer to the evidence, the case is substantially as follows: At the time the homicide was committed, the deceased, Jackson Foster, was living at the house of one Sarah Sink, between whom and himself improper relations existed. On the night of January 17, 1907, the prisoner in company with Sam Stanley and Sam Young went to the home of Sarah Sink and purchased from her a pint of whiskey. After the parties, including Foster and the woman, had taken several drinks together, Sam Stanley and Young, as partners, engaged Foster and his paramour in a game of cards, at which game the former were losers. About eleven o'clock the three men were invited to spend the night, the arrangement being that Sam Stanley and Young should occupy an upstairs room, and Arthur Stanley and Foster the room on the lower floor in which they had spent the evening. Shortly after the two men, accompanied by the woman, who went to prepare a place for them to sleep, had gone upstairs, they heard loud talking—quarreling—in the lower room, and Arthur Stanley called out to his companions, telling them that he did not intend to spend the night at that house. Thereupon, they immediately came downstairs, preceded by Sarah Sink, who entered the room in which they had left Stanley and Foster, Sam Stanley and Young remaining in the hall. The door was half open, and Foster, with his hand against the side of the mantel-piece, was in the act of rising from his chair. He started rapidly toward the door, and in an angry manner.

The witness, Sarah Sink, continuing her testimony, said: "He was drinking heavily, and I knew how he was when he was drinking and aimed to close the door so that he could not

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get out and get into any fuss. Then a pistol fired and Foster whirled around and fell on his face right before the fire."

Witness did not see who fired the shot, nor whence it was fired; she did not see the prisoner in the room, or backed behind the door; and saw no knife in Foster's hand and heard no threats; nor did she see him do anything to indicate a purpose to hurt anyone. Witness was shown a knife, which she identified as her property, which Foster had taken from her sewing machine drawer about two weeks before he was killed. The blade of the knife was two and a half inches long; and it was found the morning after the homicide lying half opened on the floor near the head of the deceased.

On the night of the killing, the prisoner was heard to say: "A certain fellow had to be killed here to-night;" and shortly after the homicide he remarked: "I killed him, G— d— him (meaning Foster), and I aimed to do it."

To the contrary of this version of the tragedy, the two companions of the prisoner (one of whom was jointly indicted with him) testified, that when they reached the door of the lower room it was half open, and they saw Foster advancing on Stanley with a knife in his hand upraised in a threatening manner. The prisoner, while retreating toward the door, exclaimed: "Don't crowd me with that knife, Jack Foster." That at that moment Sarah Sink partly closed the door, which caused Stanley to miss the opening and placed him behind the door. Foster continued to advance and the prisoner, thereupon, fired the fatal shot.

It is idle to attempt to maintain that there is no conflict in the testimony of these witnesses. The evidence presents two utterly opposing theories with regard to the transaction, founded upon conflicting testimony of eye-witnesses. It is impossible that both accounts can be true; and the triers of fact, the jury, have seen fit to accept as true the testimony on behalf of the Commonwealth; and the trial court, in this

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state of the evidence, upon familiar principles, properly declined to disturb the verdict.

After all the evidence for the defense had been introduced, the prisoner moved the court to have the jury view the premises; whereupon, the court stated that it would not grant a view unless the jury desired it, and turning to the jury inquired if they thought a view would aid them in understanding the evidence and in arriving at a proper verdict. But the jurors indicated that they did not wish to view the premises, and the motion was overruled.

Of the correctness of that ruling we entertain no doubt. The purpose of a view is not to supply evidence, but to enable the jury to apprehend it. Granting or refusing a view is a matter necessarily largely in the discretion of the trial court, and an appellate tribunal will not undertake to control such discretion, unless it plainly appears that it was erroneously exercised.

"This court cannot say that the circuit court erred in overruling the motion, unless it appears from the record that a view was necessary to a just decision." *B. & O. R. Co. v. Polly, Woods & Co.*, 14 Gratt. 447, 471.

In the present instance, a diagram representing a plan of the dwelling in which the homicide occurred was produced, and clearly explained. It was a simple structure, and the jury could not have failed to comprehend the situation.

The remaining assignments of error were not pressed in the oral argument, and being without merit it is not worth while to discuss them.

Judgment affirmed.

*Affirmed.*

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Syllabus.

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**Richmond.****BURTON V. COMMONWEALTH.**

January 14, 1909.

1. **CRIMINAL LAW—Amending Verdict—Materiality—Polling Jury.**—  
When it becomes necessary to amend the verdict of a jury in a matter of substance, it is the safer practice to send the jury to their room where they can find such verdict as they deem proper, untrammelled by the presence or influence of others, but if the amendment is made by the clerk in the presence of the jury, and the jury is then polled and each juror assents to the amended verdict the irregularity is cured.
2. **HUSBAND AND WIFE—Support of Wife—Continuing Duty—Breach.**—  
The object of the statute punishing the desertion or wilful neglect to provide for a wife or minor children is to compel a husband to support his wife and children, if of ability to do so. It is a continuing duty, and the breach of it may be alleged as of the time of the desertion, or at any subsequent time while the neglect continues. It would be proper in a trial under the statute to tell the jury that the desertion or neglect must have existed at the time the indictment was found.
3. **HUSBAND AND WIFE—Support of Wife—Desertion by Husband—Sufficiency of Cause.**—A quarrel or series of quarrels between husband and wife for which wife is responsible in whole or in part, do not constitute just cause for desertion on the part of the husband, or for his wilful neglect to provide for her support and that of their minor children.
4. **HUSBAND AND WIFE—Support of Wife—Destitute or Necessitous Circumstances—Question for Jury—Review.**—What shall constitute "destitute or necessitous circumstances," under the statute punishing a man for deserting his wife and minor children, depends upon the circumstances of the particular case, and is a question for the jury subject to review by the court in a proper case and upon familiar principles.
5. **HUSBAND AND WIFE—Desertion of Wife by Husband—Destitute and Necessitous Circumstances—Case at Bar.**—The evidence in this

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case does not show that the wife was at any time in destitute and necessitous circumstances within the meaning of the statute punishing a husband for deserting his wife "in destitute or necessitous circumstances," and the judgment of conviction of the husband therefor is therefore set aside.

Error to a judgment of the Hustings Court of the city of Richmond.

*Reversed.*

The opinion states the case.

*L. O. Wendenburg*, for the plaintiff in error.

*Robert Catlett*, Assistant to Attorney General, for the Commonwealth.

KEITH, P., delivered the opinion of the court.

Burton was indicted by a grand jury of the Hustings Court of the city of Richmond, under a statute approved March 12, 1904, which declares: "That any person who shall, without just cause, desert or wilfully neglect to provide for the support of his wife or minor children in destitute or necessitous circumstances, shall be deemed guilty of a misdemeanor, and shall be punished by imprisonment in jail not exceeding one year; provided, that before the trial (with the consent of the defendant), or after conviction, instead of imposing the punishment hereinbefore provided, or in addition thereto, the court in its discretion, having regard to the circumstances and financial ability of the defendant, shall have the power to enter an order, which shall be subject to change by it from time to time, as the circumstances may require, directing the defendant to pay a certain sum weekly or monthly for the space of one year to the wife or to the custodian of the minor, and to release the defendant from custody on probation for the space of one year upon his entering into a recognizance,



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with or without sureties, in such sum as the court shall direct. The condition of the recognizance shall be such that if the defendant shall make his personal appearance at court whenever ordered to do so within the year, and shall further comply with the terms of the order or of any subsequent modification thereof, then the recognizance shall be void, otherwise to remain in full force and effect." Acts 1904, p. 208, Code (1904), sec. 3795c.

Burton was found guilty, and the court, overruling a motion to set aside the verdict, entered judgment in accordance with the statute, that Walter S. Burton do "pay to his wife, Florence Dickerson Burton, the sum of thirty-five dollars per month for the period of twelve months from June 26, 1907, the date of rendering of said verdict of guilty, and that the accused is released from custody on probation, upon his entering into a recognizance in the sum of \$1,000, with surety, to be approved by the court, conditioned according to law. But in the event the accused fails to give said recognizance or pay said money, then it is ordered in accordance with the verdict of the jury that he be remanded to the custody of the sergeant of the city of Richmond, Va., and be confined in the city jail for the period of one year or until the further order of this court."

"To which action of the court in fixing the amount at \$35.00 per month, the accused excepted on the ground that the same is excessive, and to the action of the court making the same payable from June 26, 1907, instead of from this date, the accused excepted."

To this order a writ of error was awarded by this court upon the petition of the defendant.

The first error assigned is that the jury were permitted to amend their verdict, which in the first instance read as follows: "We, the jury, find the prisoner guilty of wilful desertion without just cause, and ascertain his punishment at twelve months in the city jail." Thereupon, the court directed the clerk to put the verdict of the jury in proper form, and the

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clerk re-wrote it, "We, the jury, find the prisoner guilty as charged in the indictment, and ascertain the term of his confinement in the city jail at twelve months."

The indictment charges the defendant in the language of the statute with having, without cause, deserted his lawful wife, she being then and there destitute and in necessitous circumstances. The verdict as rendered by the jury, therefore, may be said to be materially different from the verdict as prepared by the clerk, and received and recorded by the court. It appears, however, that the jury was polled upon the verdict as amended, and that each and every juror responded, that the verdict as amended was his verdict.

As was said by this court in *Porterfield's Case*, 91 Va. 806, 22 S. E. 354, "the practice of allowing a verdict of the jury to be put in form in open court is a proper, and, in many cases, a necessary practice; but the amendment made in this verdict was not as to matter of form but of substance. By the verdict returned by the jury, the accused was acquitted of feloniously entering the bar-room, and found guilty of grand larceny. By the amended verdict he is found guilty, as charged in the indictment, which embraces both the offense of entering the bar-room and of grand larceny. The fact that the jury was polled and each member assented to the amended verdict would, perhaps, have cured the irregularity; but, as the cause has to be reversed upon other grounds, it is unnecessary to decide that question and we are not to be understood as expressing any opinion upon it. The proper practice in such cases is for trial courts to see that the verdict of juries is put in proper form before they are discharged, but if any change in the substance of the verdict is to be made, the jury should be sent back to their room, where they can, untrammelled by the presence or influence of others, find such verdict as they deem proper."

We are still of opinion that it is the safer practice to send the jury to their room, when it becomes necessary to amend

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their verdict as to any matter of substance; but we are of opinion that the prisoner was not prejudiced by what was done in this case, and that this assignment of error is without merit.

In order to establish the offense of which the plaintiff in error was found guilty, it must be made to appear that, without just cause, he deserted or wilfully neglected to provide for the support of his wife or minor children, leaving them in destitute or necessitous circumstances. They may be in destitute circumstances at the time the desertion takes place, or they may become destitute as a consequence of the desertion on the part of the husband and his wilful neglect to provide for their support. The object of the statute was to compel the husband, if he were able to do so, to support his wife and children. It is a continuing duty and the breach of it may be stated as having occurred either at the moment of the desertion or at any time during the continuance of the wilful neglect to make provision for his wife or minor children, whom he has left at the moment of desertion, or who have since been rendered destitute or in necessitous circumstances.

The instructions given by the court seem to be, in the main, correct, though it would have been proper to tell the jury, that the desertion of the wife, or the failure to provide for her, must have existed at the time the indictment was found.

Instruction "B," asked for by the defendant, is as follows: "The court further instructs you, that if you believe from the evidence, when the defendant separated from his wife, that the separation was due to a quarrel, or to a series of quarrels, that his wife was responsible for, or in part responsible for, then you cannot convict the accused."

To have given that instruction would have been for the court to say, that a quarrel, or series of quarrels, for which the wife was responsible, or in part responsible, constituted a just cause for desertion on the part of the husband, or for his

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wilful neglect to provide for her support, and that of their minor children. We think it was properly refused.

As to what shall be considered sufficient proof of the offense must depend upon the circumstances of each case. There is no fixed standard by which the law undertakes to define what shall constitute "destitute" and "necessitous circumstances." It may vary with the conditions to which the parties have been accustomed. The necessities of one person may be the luxuries of another, reared in and habituated to different surroundings. It is safest, therefore, to leave it to the jury to say whether or not the facts established the charge, subject always to review by the court in a proper case and upon familiar principles.

We see no error of law, therefore, in the refusal of the court to give instruction "C," asked for by the plaintiff in error, in which the jury were told, that if they believe from the evidence that "when the defendant separated from his wife, on September 5, 1906, she had \$1,144.96 to her credit in the National Bank of Virginia, and this was from money given her by her said husband, and that now she has as much as \$132.00 of this money, and that in addition to that she has about \$300.00 worth of jewels given her by him, and possesses real estate that cost \$375.00, and that this was given her by him, then she is not in the destitute and necessitous circumstances contemplated by the law, and you must acquit him."

It is true there is evidence tending to prove all the facts upon which this instruction is predicated. There is also a statement by Mrs. Burton, that she was not at the time her husband left her in destitute circumstances, though she adds that she had very little left.

There is also evidence in the record that she is an extravagant, frivolous and self-indulgent woman; that her husband is a man of limited resources, engaged in a business, the profits of which are variable and uncertain. We are of opinion,

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therefore, that it does not appear that Mrs. Burton was at any time in destitute or necessitous circumstances, within the meaning of the statute.

The judgment of the hustings court is, therefore, reversed, and the case remanded for a new trial.

*Reversed.*

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**Richmond.**

## PARKS v. COMMONWEALTH.

January 21, 1909.

1. **CRIMINAL LAW.—Evidence—Death of Witness Between Trials—Proof of Former Testimony.**—If a witness for the prisoner in a criminal prosecution has been examined and cross-examined at one trial and dies before a second trial of the case, his testimony given on the first trial may be proved by the prisoner on the second trial. *Finn's Case*, 5 Rand. 701, and *Broggy's Case*, 10 Gratt. 722, explained.

Error to a judgment of the Circuit Court of Scott county.

*Reversed.*

The opinion states the case.

*W. S. Cox*, for the plaintiff in error.

*Robert Catlett*, Assistant to the Attorney General, for the Commonwealth.

WHITTLE, J., delivered the opinion of the court.

The accused, Ira Parks, brings error to a judgment of the Circuit Court of Scott county, whereby he was convicted of voluntary manslaughter, and sentenced accordingly.

The first assignment of error is to the action of the court in excluding the testimony given by the wife of the plaintiff in error on a former trial of the case.

The witness testified at the first trial and was cross-examined

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by the Commonwealth's attorney, and, having died before the second trial, the accused sought to prove her testimony, but the court refused to admit the evidence.

Although the doctrine of the admissibility of such evidence is well settled both in England and in this country, the precise question never seems to have been decided by this court. *Finn's Case*, 5 Rand. 701, and *Brogy's Case*, 10 Gratt. 722, are relied on by the Attorney General to maintain the rule of exclusion; but an examination of those cases will show that the court was dealing with witnesses absent from the Commonwealth, and not such as had died after a previous examination. Some of the authorities hold that manifestly different principles apply to the two classes of witnesses.

*Finn's Case* was decided by the general court in 1827, and the statement of the learned judge who delivered the opinion, that although in a civil action proof might be given of the former testimony of a witness since dead, the rule was otherwise in a criminal prosecution, was purely *obiter dictum*, since, as remarked, the witness in that case was not dead but absent from the Commonwealth.

In *Brogy's Case*, the court quoted with approval the *dictum* in *Finn's Case*, without discussing the principle involved, or citing any other authority.

*Cite's Case*, 1 Va. Dec. 423, recognizes the fact that the question is an open one in Virginia; but the court declined to decide the point, because it did not arise in that case.

In considering the doctrine, Wigmore in his work on Evidence, at section 1398, observes: "In dealing with *depositions* and *former testimony*, our courts have almost unanimously received them in criminal prosecutions, as not being obnoxious to the constitutional provision. The leading opinions were rendered chiefly between 1840 and 1860. Up to 1886, apparently the only contrary precedent not overruled was an early Virginia case, afterwards often cited, which professed to decide the question merely on English precedent, and not on

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constitutional grounds, and proceeded on the authority of an earlier English treatise, which in turn went upon the authority of Fenwick's trial—a parliamentary decision precisely to the opposite effect, and misunderstood by the writer for the treatise. This early Virginia ruling, of so little weight in itself, served however to keep a doubt alive; and in the last generation a few ill-considered rulings in other jurisdictions have followed it. Apart from these rulings, it is well and properly settled that such evidence—assuming always that there has been a due cross-examination—is admissible for the State in a criminal prosecution, without infringing the Constitution." The discussion of the subject is continued in subsequent sections, and the authorities are collected and digested in notes, with later decisions cited, in Volume V (supplement) under the same sections.

An interesting review of *Fenwick's Case*, 4 St. Trials, 265, will be found in 2 Va. Lew Reg. 807.

The doctrine of the admissibility of such evidence is also exhaustively treated by Mr. Justice Brown in *Mattox v. U. S.*, 156 U. S. 237, 39 L. Ed. 409, 15 Sup. Ct. 337. The learned justice, after declaring the rule well settled in England, says: "As to the practice in this country, we know of none of the States in which such testimony is now held to be inadmissible." See also *Reynolds v. U. S.*, 98 U. S. 145, 25 L. Ed. 244; *West v. Louisiana*, 194 U. S. 258, 48 L. Ed. 965, 24 Sup. Ct. 650.

It would indeed present an anomalous state of the law to admit such evidence in civil cases, involving property rights merely, and to apply the rule of exclusion to criminal cases, involving life and liberty, when the introduction of such evidence is not infrequently of controlling weight, either in bringing the guilty to punishment on the one hand, or of shielding the innocent on the other.

We are of opinion that this assignment is well taken, and that the trial court erred in excluding evidence of the former testimony of the deceased witness.



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The next assignment concerns the ruling of the court upon instructions. A brief statement of the essential facts of the case, with respect to which there is no serious conflict, will tend to elucidate the objections to the court's ruling under this assignment.

The accused had employed David Robbins to move his effects from the land of his mother-in-law, Mrs. Sarah Gilliam, where he had been living, to a farm which he and his wife had recently purchased. The wagon was standing in the public road close to the yard fence in front of the house. Robbins was in the wagon loading the furniture and household goods as Parks would pass them up to him. For the most part, the loading was done by handing the furniture over the fence, but some of the articles were carried through a gap in the fence to the back of the wagon and loaded from that position. While the loading was in progress, Samuel Gilliam, the deceased, a son of Mrs. Sarah Gilliam, came up to the yard fence, near the front end of the wagon tongue, and said to Parks, who was on the inside of the fence engaged about his work: "Don't you take them windows out of the house." To which Parks replied: "I am not going to take them out." Gilliam then turned to Mrs. Parks and said: "Don't you take them out." She said: "I bought them and have paid for them, and I am going to take them out." Continuing, Gilliam remarked to Parks: "You have already taken some of the plank off that shed down there." Which Parks denied, and Gilliam rejoined: "It's a d—d lie, you have." Parks iterated the denial; and Gilliam said: "You have, I will swear it and can prove it." Parks thereupon stated: "If you swear it, you will swear a d—d lie, and if you prove it, you will prove a d—d lie."

Robbins then interferred and said: "This must be stopped; I am not going to have any trouble here." But Gilliam continued the altercation, saying to Parks: "You cannot come out in the road and talk that way"; to which Parks replied: "I

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can talk it anywhere. I will have to be in the road loading the wagon, and you go away and let me alone."

Parks had walked up about the porch and was standing on the steps. About that time he started out into the road through the gap in the yard fence near the hind end of the wagon, he says, with the foot-board of a bed-stead in his hand. Robbins says he did not see anything in his hand when he came out in the road, but he adds: "I was in the wagon, busy, and Parks was handing the things in to me." Witness further stated that when Parks was in the yard he was nearer to Gilliam than he was at the rear end of the wagon, and there was nothing to have prevented him from shooting Gilliam before he went into the road, had he been so disposed; that if Gilliam had remained where he was standing by the fence, witness would have been directly between him and Parks. Continuing, he says: "I looked and saw Sam Gilliam coming up towards the front wheel of the wagon on the opposite side from the fence. When he got about the center of the fore-wheel, I saw he had his pistol out in his right hand (indicating and pointing his hand toward the floor in front of him at an angle of about 40 or 45 degrees)." Witness then turned his eyes towards Parks, who was standing at the hind end of the wagon, about the hind wheel next to the road, and he had his pistol pointed toward Gilliam, and the shooting instantly began. "I thought at the time Gilliam had shot, but he didn't."

Parks' statement is that he saw Gilliam advancing on him, and just as he reached the front wheel of the wagon, "he threw his pistol on me, and I drew mine and fired as quick as I could. It was all done in an instant." He declared that he did not go into the road for a difficulty; that he had a man hired and had to go on with his work; that he shot Gilliam because he honestly believed he intended to kill him. He fired four shots, two of which took effect.

The plaintiff in error excepted to the giving of instructions 1, 2, and 3 on behalf of the Commonwealth; and also to the

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court's modification of his instructions 3, 5 and 7. The trend of all these instructions is to qualify or abridge the right of self-defense upon which the accused relies as an excuse for the homicide, on the assumption that he, to some extent at least, was instrumental in bringing on the difficulty.

In view of the fact that the case is to be remanded for a new trial, we shall abstain from commenting on the evidence further than to remark that we do not think it justifies an instruction founded on the theory that the accused provoked the difficulty.

For these reasons, the judgment complained of must be reversed, the verdict of the jury set aside, and the case remanded for further proceedings.

*Reversed.*

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Syllabus.

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**Richmond.**

## CLOPTON V. COMMONWEALTH.

March 11, 1909.

1. **CRIMINAL LAW—Indictment—Sufficiency—Charging Sale of Intoxicating Liquor—Delivery.**—An indictment for the sale of ardent spirits without license, substantially in the language of the statute, saying nothing about delivery, is sufficient. The sale includes the delivery.
2. **CRIMINAL LAW—Indictment—Names of Witnesses—Directory Statute.**—The statute requiring the names of the witnesses upon whose testimony an indictment is found to be written at the foot of the indictment is directory only, and the absence of such names is not a valid objection to the indictment.
3. **CRIMINAL LAW.—Indictment for the Sale of Intoxicating Liquors—Allegation of Time—Name of Purchaser.**—It is unnecessary to allege in an indictment for the unlawful sale of intoxicating liquors, the precise time when, or the person to whom, the sale was made. The charge that the defendant did "unlawfully sell and deliver intoxicating liquors," is sufficient. Nor can the Commonwealth be required to state in advance of its evidence, the time when, or the person to whom, the sale was made.
4. **CRIMINAL LAW—Sale of Intoxicating Liquors—Possession of United States License—Constitutional Enactment.**—The statute making the possession of a United States revenue license to sell liquor by one not licensed to sell under the State law *prima facie* evidence of a sale of liquor contrary to the State law is a valid and constitutional enactment.
5. **CRIMINAL LAW—Sale of Liquor—Testimony of Defendant—Proof Satisfactory to Jury—Interested Witness.**—A jury is not obliged to believe the testimony of an interested or biased witness, though unimpeached, and the mere fact that a defendant indicted for the unlawful sale of intoxicating liquors, and his confidential clerk, testify that no illegal sale was made is not good ground for setting aside a conviction founded on evidence of the possession of a United States revenue license, as the

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statute provides that, in such case, the burden of proof is on the defendant, and that unless he shows by satisfactory proof that he has not violated the law he shall be convicted. Whether the proof was satisfactory or not was a question for the jury, who were not obliged to accept as "satisfactory" the testimony of the defendant and his clerk.

Error to a judgment of the Circuit Court of Gloucester county.

*Affirmed.*

The opinion states the case.

*J. N. Stubbs*, for the plaintiff in error.

*Robert Catlett*, Assistant to the Attorney General, for the Commonwealth.

KEITH, P., delivered the opinion of the court

The grand jury of Gloucester county found an indictment against T. C. Clopton, charging that in the year 1908, in said county, and on each day thereafter, up to and including the 29th day of February, 1908, he did unlawfully sell by retail wine, ardent spirits, malt liquors and mixtures thereof, he, the said Clopton, not then and there having a license so to do from the State of Virginia, against the peace and dignity of the Commonwealth.

Upon the trial before a jury, he was found guilty as charged in the indictment, and assessed with a fine of \$20, upon which verdict the court entered a judgment which is before us for review.

The first assignment of error is that the demurrer to the indictment should have been sustained, because it only charges that the defendant did unlawfully sell, and does not state that a delivery was made.

The indictment is substantially in the language of the

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statute. The sale includes the delivery, and this objection is not well taken.

There was a motion to quash the indictment, because the names of the witnesses upon whose testimony the indictment was found were not written at its foot.

This objection to indictments has been often made, and has always been overruled, upon the ground that the statute requiring the names of the witnesses to be placed at the foot of the indictment is not mandatory but directory only. No good reason is perceived why this objection should be so often reiterated when, under the numerous decisions of this court, it should be considered as finally closed.

After the jury had been sworn, and before any evidence had been introduced, the defendant moved the court to require the Commonwealth to name a day and point out to whom a sale had been made, which motion the court overruled, and this ruling of the court is now assigned as error.

In *Runde v. Commonwealth*, 108 Va. 873, 61 S. E. 792, 2 Va. App. 291, citing numerous decisions of this court bearing upon the subject, it was held to be unnecessary to allege in an indictment for the unlawful sale of intoxicating liquors, the precise time when, or the person to whom, the sale was made; the charge that the defendant did "unlawfully sell and deliver intoxicating liquors" is sufficient.

After the evidence had been introduced, the court gave the following instruction: "The court instructs the jury, that the possession of an internal revenue receipt by T. C. Clopton is *prima facie* evidence of the sale of liquor in Gloucester county in the time covered by the indictment, and unless it shall be proved to their satisfaction that the law has not been violated and no sale has been made in said county during the months of January and February, they should convict the accused."

By an act approved March 15, 1906, it was declared that the possession of a United States internal revenue tax receipt for the sale of ardent spirits in this State shall be *prima facie*

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evidence of the sale of liquor. "And whenever the holder of such a receipt shall not be licensed to sell wine, ardent spirits, malt liquor, or any mixture of any of them, under and in accordance with the laws of Virginia, and shall be prosecuted or otherwise proceeded against for the illegal sale \* \* \* the burden of showing that he has not violated the law shall be upon him, and in the absence of satisfactory proof that he has not violated the law shall be convicted \* \* \*." Acts, 1906, p. 411.

The constitutionality of this statute was considered and sustained in *Runde v. Commonwealth*, *supra*, and similar statutes have been upheld in *Commonwealth v. Austin*, 97 Mass. 505; *Fruddie v. State*, 66 Neb. 244, 92 N. W. 320; *State v. Intoxicating Liquors*, 80 Maine, 57, 12 Atl. 794; and *Leavitt v. Baker*, 82 Maine, 26, 19 Atl. 86.

We are of opinion that the instruction correctly stated the law to the jury as embodied in the statute, and the objection to it cannot be maintained.

The remaining assignment of error is to the refusal of the court to set aside the verdict upon the motion of the defendant, as being contrary to the law and the evidence.

The Commonwealth, to maintain the issue on its part, introduced evidence showing that T. C. Clopton obtained and had in his possession a United States internal revenue tax receipt for the sale of ardent spirits within this State during the period covered by the indictment, and rested its case. Thereupon the defendant testified in explanation of his possession of this internal revenue license or receipt, that he was advised by the United States revenue collector to pay the tax, because he was selling drugs which had a large percentage of alcohol, and was also selling cider, and that he determined that it would be cheaper for him to take out the license than to incur the risk of being arrested and carried before the United States court; that he had not sold intoxicating liquors in his store

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during the time covered by the indictment, nor did he have in his store during that period any intoxicating liquors.

The evidence of his clerk tends to corroborate the statements of the defendant, and a Mr. Linden also testified that he was at the store of the defendant almost daily and never saw any intoxicating liquors sold there by the defendant, or by anyone else.

As is said in *Runde v. Commonwealth, supra*, the language of our statute, making the possession of a United States license evidence of the sale of intoxicating liquor, means that such possession raises an inconclusive or disputable presumption that the fact exists, unless and until something is offered to show the contrary. It is inconclusive and disputable because the statute in terms declares that it shall be *prima facie* evidence of the sale of liquor, the effect of which is, by the succeeding terms of the statute, to place the burden of showing that he has not violated the law upon the defendant who holds such license; and, in the absence of satisfactory proof that he has not violated the law, he shall be convicted.

Certainly, if the defendant had introduced no testimony, the statute would have justified—indeed, have required—the jury to convict. The defendant, however, in this case assumed the burden of showing that he had not violated the law, and introduced evidence to that effect. The statute says that the proof must be “satisfactory” that the law has not been violated, and that the burden of showing this is upon the defendant. Proof satisfactory to whom? To the tribunal established by law for the determination of facts.

In this case, the jury had before it evidence sufficient, of itself, when standing alone, to require a conviction. The defendant had the burden placed upon him of overcoming this *prima facie* case, of meeting this inconclusive and disputable presumption of guilt, and he undertook to bear the burden. But the jury were not satisfied with the proof. In their judgment the *prima facie* case was not met by the evidence



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which the defendant introduced, and in the exercise of that discretion with which the jury is clothed by the law, they found the defendant guilty; and that verdict, having been sustained by the trial court, cannot here be disturbed, unless the court can say as matter of law that it was the duty of the jury to give credit to the witnesses for the defense.

In Proffatt on Jury Trial, section 363, it is said: "The general rule, that where unimpeached witnesses testify positively to a fact, and are uncontradicted, the jury are not at liberty to discredit their testimony, is subject to exceptions; as, where the statements of the witness are grossly improbable, or he has an interest in the question at issue. However well settled the rule may be that the credibility of a witness is for the jury, the judge has power to instruct them as to what circumstances are to be unfavorably considered in their estimation of his evidence. So the testimony of a witness may be wholly rejected by a jury, if from his manner and the improbability of his story or his self-contradiction in the several parts of his narrative, the jury become convinced that he is not speaking the truth; and this is true although he be not attacked in his reputation, or contradicted by other witnesses."

In Wigmore on Evidence, at section 2034, it is said: "The mere assertion of any witness does not of itself need to be believed, even though he is unimpeached in any manner: because to require such belief would be to give a quantitative and impersonal measure to testimony."

In *Charleston Ins. &c. Co. v. Corner*, 2 Gill (Md.) 411. the syllabus of the case states: "The jury have the power to refuse their credit to parol testimony, and no action of the court should control the exercise of there admitted right to weigh its credibility." *Conrad v. Williams*, 6 Hill (N. Y.) 444.

In *Elwood v. Western Union Tel. Co.*, 45 N. Y. 549, 6 Am: Rep. 140, speaking of the credit to be attached to an uncontradicted witness, the court said: "Very clear and decisive

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evidence was required in this case to establish that the message which came over the defendant's wires was not communicated in the natural and ordinary manner. From the necessity of the case, such evidence as there is to that effect proceeds wholly from parties having an important interest in the question. Each of them, if guilty of the negligent act, would have the strongest motive to deny it, as the admission would subject him or her to severe responsibility for the consequences. This is a controlling consideration in determining whether the statements of these witnesses should be taken as conclusive. Without imputing a want of truthfulness to these witnesses, we think that their relation to the subject-matter in controversy was of itself sufficient to take from the court the right to dispose of the case upon their evidence and to require that the jury should pass upon the weight to be given to their statements."

In *Kavanagh v. Wilson*, 70 N. Y. at p. 179, the court says: "It is undoubtedly a general rule, that when a disinterested witness who is in no way discredited, testifies to a fact within his own knowledge, which is not of itself improbable, or in conflict with other evidence, the witness is to be believed, and the fact is to be taken as legally established, so that it cannot be disregarded by court or jury. But this case is not fairly brought within this rule. Here the witness was not wholly disinterested. He was a son of the plaintiff, engaged in his business and thus biased and interested in feeling."

In *Sipple v. State*, 99 N. Y. 289, 1 N. E. 896, dealing with the credibility of a witness, the court said: "This witness was not disinterested, and the trial court might well have regarded his evidence on that point with suspicion and incredulity. He had been charged, in a criminal prosecution, with liability for the mischief occasioned by the act in question, and although discharged from that accusation, still remained liable to a civil action for damages, and to prosecution for felony under section 479 of the Penal Code and to other punishment, under

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section 480. He was, therefore, influenced by the most serious considerations, not only to repel the imputation of neglect as against himself, but to throw the suspicion of guilt upon others. Under the circumstances surrounding this man, the trial court was under no legal obligation to give implicit credit to his testimony."

In the case at bar, the principal witness was the defendant, who testified in his own behalf. In corroboration of his testimony he introduces a witness bearing his own name and occupying toward him certainly a confidential relation as clerk in his store. Both of these witnesses come within the influence of the principles established by the text-writers and adjudicated cases which we have cited.

There is another consideration which has a strong tendency to support the verdict of the jury. It was within the power of plaintiff in error to have established the truth of his statement by a disinterested witness. He might have called upon the collector of internal revenue to testify in his behalf, and the testimony of an unimpeached and disinterested witness would have freed the subject from all doubt; but this he did not do, but saw fit to rely upon the testimony of himself and of his clerk, one of whom was directly interested in the result, and the other, in the language of *Kavanagh v. Wilson, supra*, "biased and interested in feeling."

We are of opinion that the judgment of the circuit court should be affirmed.

*Affirmed.*

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**Richmond.****JENNINGS V. COMMONWEALTH.**

March 18, 1909.

**1. CRIMINAL LAW—Seduction—Unmarried Female—Divorced Woman.—**

A woman who has been married and divorced is not an "unmarried female" within the intendment of section 3677 of the Code providing punishment for the seduction of "any unmarried female of previous chaste character." Criminal laws are not to be extended by construction, but must be limited to cases clearly within the language used.

Error to a judgment of the Circuit Court of Louisa county.

*Reversed.*

The opinion states the case.

*Gorden & Gorden*, for the plaintiff in error.

*Robert Catlett*, Assistant to the Attorney General, for the Commonwealth.

WHITTLE, J., delivered the opinion of the court.

The accused, Charles Jennings, brings error to a judgment of the Circuit Court of Louisa county, by which he was convicted of seduction of the prosecutrix under promise of marriage, and sentenced to two years confinement in the State penitentiary.

The prosecution arose under Va. Code, 1904, section 3677. That portion of the section applicable to this case is as follows: "If any person, under promise of marriage, seduce and have

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illicit connection with any unmarried female of previous chaste character \* \* \* he shall be guilty of a felony, and, upon conviction thereof, shall be punished by confinement in the penitentiary not less than two, nor more than ten years."

The female alleged to have been seduced was a divorced woman, and the sole question for our determination is whether or not a woman who has been married and divorced is an "unmarried female" within the intendment of section 3677.

It is conceded that in its ordinary and primary sense the word "unmarried" means "never having been married"; but it is contended that the term is of flexible import, and that circumstances may be sufficient to show that it is used in the less comprehensive sense of "not having a husband or wife at the time in question." 2 Bouvier's Law Dict. 1181; Words and Phrases, 7196.

In *Pratt v. Mathew*, 22 Beavan, 328, Sir John Romilly, master of the rolls, held that in a gift to a woman unmarried at the time, with direction that if she dies unmarried it shall go over, the word "unmarried" is to be construed as "never having been married." Though he says, the meaning of the word is to be determined according to the circumstances attending its use.

This statement of the rule is settled by numerous decisions. *Day v. Barnard*, 30 Law Journal (Eq.) 220; *Dalrymple v. Hall*, L. R. 16 Chy. Div. L. R. 715; *Moberly v. Strode*, 3 Vesey, Jr. 450; *Bell v. Phyn*, 7 Vesey, Jr. 455; *Clarke v. Cotts*, 9 H. L. Cas. 601; *Hall v. Robertson*, 21 Eng. L. & E. R. 504; *Heywood v. Heywood*, 29 Beavan, 9; *Radford v. Willis*, L. R. 7 Ch. App. Cas. 7; *Mertens v. Walley*, L. R. 26 Ch. Div. 576; *Blundell v. Defalbe*, 57 L. J. Ch. 576.

There is nothing in the context of this act to indicate that the legislature employed the word "unmarried" otherwise than in its usual and ordinary sense; and, being a highly penal statute, we must construe it strictly in the interest of the "liberty of the citizen. It is a rule of general application that

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such statutes are not to be extended by construction, but must be limited to cases clearly within the language used. *Fox's Admr. v. Com'th*, 16 Gratt. 1; *Harris v. Com'th*, 81 Va. 240, 59, Am. Rep. 666; *Street v. Broaddus*, 96 Va. 825, 32 S. E. 466; *Gates v. City of Richmond*, 103 Va. 702, 49 S. E. 965.

In the case of *United States v. Leacher*, 134 U. S. 624, 33 L. Ed. 1080, 10 Sup. Ct. 625, Fuller, C. J., observes: "There can be no constructive offenses, and before a man can be punished, his case must be plainly and unmistakably within the statute."

So, in the case of *United States v. Willberger*, 5 Wheat. 76, 95, 5 L. Ed. 37, Marshall, C. J., lays down the principle as follows: "The rule that penal laws are to be construed strictly is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle, that the power of punishment is vested in the legislative, not in the judicial, department. It is the legislature, not the court, which is to define a crime, and ordain its punishment \* \* \*. The case must be a strong one indeed, which would justify a court in departing from the plain meaning of words, especially in a penal act, in search of an intention which the words themselves did not suggest. To determine that a case is within the intention of a statute, its language must authorize us to say so. It would be dangerous indeed to carry the principle, that a case which is within the reason or mischief of a statute is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of kindred character, with those which are enumerated." See also Bishop on Stat. Crimes, sec. 193.

In this sort of offenses, at common law, the woman was considered *particeps criminis*, and the man was not punishable criminally for his participation in the joint delinquency. *Ander-son v. Com'th*, 5 Rand. 627, 16 Am. Dec. 776. But in process of time, experience and a more enlightened public sentiment

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showed, that in many instances unmarried females of chaste character needed the protection of the strong arm of the law to shield them in their innocence from the lustful machinations of evil-disposed men, who resorted to the blandishments of courtship and false promises of marriage to accomplish the ruin of their too confiding victims.

But the case is wholly different with women who have been married. They have known man; and, possessed of the knowledge which such intercourse imparts, if chaste, are immune from the seducer's wiles.

It is the purpose of the enactment under consideration, as gathered both from the language and the reason of the law, to include the former and not the latter class of females.

For these reasons, we are of opinion to reverse the judgment of the circuit court, and remand the case for a new trial.

*Reversed.*

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**Richmond.****TAYLOR V. COMMONWEALTH.**

March 18, 1909.

1. **CRIMINAL LAW—Verdict Without Evidence—Case at Bar—Possession of Cocaine.**—The evidence in the case at bar is wholly insufficient to sustain a conviction of the statutory offense of having in possession, cocaine "with intent to sell, give away, or otherwise dispense the same." The cocaine was never ordered to be sent to this State, and only came into her borders as a result of a mistake made by the consignors. The defendant positively refused to receive the same, and never for a moment had any such possession of it as would have enabled him to do any of the acts forbidden by the statute. Upon such evidence no conviction can be rightly had.

Error to a judgment of the Corporation Court of the city of Norfolk. Defendants assign error.

*Reversed.*

The opinion states the case.

*James F. Duncan*, for the plaintiff in error.

No appearance for the Commonwealth.

HARRISON, J., delivered the opinion of the court.

The plaintiff in error was convicted, under the act approved March 13, 1908, of having in his possession certain cocaine, with intent to sell, give away and otherwise dispense the same, and was sentenced to confinement in the penitentiary for a term of two years. Acts 1908, p. 378.

The facts shown by the record are that the defendant wrote



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from the city of Norfolk, Va., to the Albany Chemical Co., of Albany, New York, directing that company to ship by express to his address at Henderson, in the State of North Carolina, the cocaine in question. By inadvertence, which the Albany Chemical Company admits was its mistake, the cocaine was sent by Adams Express Company to the address of the defendant in Norfolk, Va. On the arrival of the package, Adams Express Company attempted to deliver it to the defendant at Weisel's drug store, in Norfolk, where he worked, but the defendant refused to receive the same, and ordered the express company to forward it to Henderson, N. C. This the company declined to do, upon the ground that it had no express facilities at that point, advising the defendant to ship the package to Henderson, N. C., by the Southern Express Company. After some days delay, finding that Adams Express Company would not complete the carriage to North Carolina, the defendant gave a friend \$2.00, requesting him to pay the express charges and to deliver the package to the Southern Express Company to be shipped to his address at Henderson, N. C. While carrying out these instructions, the friend, who did not know what was in the package, was arrested.

Upon these facts, the defendant was found guilty of being in possession of cocaine with intent to sell, give away and otherwise dispense the same in violation of the statute.

The learned Attorney General files no brief, properly conceding that this evidence was wholly insufficient to warrant the conviction complained of.

It is uncontradicted that the cocaine was never ordered to be sent to Virginia, and only came into her borders as the result of a mistake made by the consignors; that the defendant positively refused to receive the same, and never for a moment had any such possession of it as would have enabled him to do any one of the acts forbidden by the statute. That the defendant had no intention of selling, giving away or otherwise dispensing the cocaine in the State of Virginia in violation of her statute,

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is shown by the State's own witness, who was taking the package to the Southern Express Company for the purpose of having it shipped to the State of North Carolina.

The judgment complained of must be reversed, the verdict of the jury set aside, and the case remanded for a new trial not in conflict with the views herein expressed.

*Reversed.*

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Syllabus.

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**Richmond.****COMMONWEALTH V. GOODWIN.**

March 18, 1909.

1. **APPEAL AND ERROR—Criminal Law—Appeal by State—Revenue Cases.**—Where the defence to a prosecution for the unlawful sale of malt liquor is that the defendant had the right to sell it at the place where sold, under the revenue laws of the State, the case involves “a violation of a law relating to the State revenue” within the provisions of section 88 of the Constitution, and section 4051 of the Code, and an appeal lies on behalf of the Commonwealth.
2. **INTOXICATING LIQUORS—Meaning of “Malt Liquors.”**—The general term “malt liquors” includes both intoxicating and non-intoxicating malt liquors, and if a statute specifically forbids the unlicensed sale of malt liquors, the question of the intoxicating properties of the liquor is immaterial.
3. **INTOXICATING LIQUORS—Byrd Law—“Malt Beverage”—Compliance With General Law—Violation of Local Charters.**—Where the charter of a town provides that no license shall be granted to any person, club or corporation to sell ardent spirits, malt liquors or any mixture thereof without the written consent of the council of the town and compliance with other provisions of the charter of the town, a brewing company, although it has complied with all the provisions of section 28 1-2 of the Byrd liquor law, is not authorized to sell “malt beverage” in said town through an agent located and doing business there, except with the written consent of the council of the town and a compliance with the other provisions of its charter. Section 28 of the Byrd law expressly provides that nothing in the act shall be construed as changing the provisions of the charter of any town or city touching the granting of license. An agent of such brewing company who has failed to obtain license in said town, and who makes sale of “malt beverages” therein is liable to the penalties prescribed for his default.

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Error to a judgment of the Circuit Court of Prince William county.

*Reversed.*

The opinion states the case.

*Attorney General Wm. A. Anderson and Robert A. Hutchinson*, for the Commonwealth.

*S. G. Bent and Julien Gunn*, for the defendant in error.

BUCHANAN, J., delivered the opinion of the court.

The defendant in error, Wade Goodwin, was convicted by a justice of the peace of Prince William county of unlawfully selling "malt liquor," or a mixture thereof, in the town of Manassas.

Upon appeal to the circuit court of that county, the whole matter of law and fact being by agreement submitted to the court, there was a judgment in favor of the accused. To that judgment this writ of error was awarded on the petition of the Commonwealth.

Upon the calling of the cause, the defendant moved the court to dismiss the writ of error as improvidently awarded, upon the ground that this is a prosecution for the violation of the "local option" law of the State, and not for a violation of the law relating to State revenue.

Whether or not a prosecution for the violation of the local option law, where there is no pretence that the sale for which the accused is prosecuted was made under a license authorizing it, need not be considered in this case. The defense of the accused in the circuit court, as appears from the facts agreed, was that he had the right to make the sale of "malt beverage," the article sold by him, and at the place where it was sold, under the revenue laws of the State. This is denied by the Commonwealth.

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The question involved in the case would seem, therefore, to come clearly within the provisions of section 88 of the Constitution, and section 4051 of the Code, which confer jurisdiction upon this court to grant a writ of error upon the petition of the Commonwealth in a case for the "violation of a law relating to State revenue."

By section 23½ of chapter 189 of the Acts of 1908—Acts 1908, pp. 275-287—known as the Byrd law, it is provided:

"That 'malt beverage' within the meaning of this section shall be construed to be the product of a brewing plant, or brewery, and shall, as to its composition, comply with the standards now, or as may hereafter be prescribed by the pure food commissioner of the United States, but shall be non-intoxicating and in no event contain in excess of two and one-quarter *per cent.* in volume of alcohol.

"No person, firm, or corporation shall manufacture 'malt beverage,' as herein defined, except subject to the provisions of this act.

" 'Malt beverage' shall be manufactured only by some person, firm or corporation having a manufacturer's malt liquor license, and who shall, before manufacturing the same, pay an additional special license tax of two hundred and fifty dollars (\$250.00) per year, and execute a bond in the penalty of ten thousand dollars (\$10,000) before and with security (either personal or corporate) approved by the judge of the circuit or corporation court of the county or city in which such manufacturing is proposed to be done; the condition of said bond shall be to faithfully comply with the provisions of this act.

" 'Malt beverage' shall be sold by the manufacturer direct to the consumer (not to be drunk where sold) and in quantities of not less than one-half dozen bottles, nor more than four dozen bottles at any one time, and shall not be sold or offered for sale by any other person, firm or corporation. 'Malt beverage' shall be sold only in bottles in which shall be blown, in letters at least one-half inch in height, the name and address of the manufac-

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turer, and the words 'malt beverage.' No person, firm or corporation shall place in such bottles and sell or otherwise transfer any liquid containing alcohol in excess of two and one-quarter *per cent.* in volume.

"Any person violating any of the provisions of this section shall, upon conviction thereof, be fined not less than five hundred dollars, nor more than one thousand dollars, or, in the discretion of the jury, confined in jail for not less than three months, nor more than twelve months for each offense."

By the facts agreed, it appears that the "malt beverage" sold by the defendant answered the description of that article as defined by that section, was sold directly to the consumer, not to be drunk where sold, in quantities of six bottles, with the name and address of the Robert Portner Brewing Company, of Alexandria, the manufacturer, blown into each bottle one-half inch in height; that the defendant was acting as the agent of said brewing company in the town of Manassas, which had a license as a manufacturer of malt liquors and had paid the additional special tax and had given the bond required in order to entitle it to manufacture and sell "malt beverage," and except a State tax of \$5.00 and a town tax of \$2.50 for a merchant's license, neither the said brewery nor the defendant had paid any license in the said town or county.

Upon the facts agreed, the guilt or innocence of the accused depends upon the question, whether a compliance with all the provisions of section 23½ of the said act in all respects authorizes the brewing company to sell "malt beverage" in the town of Manassas through an agent located and doing business in that town.

Several grounds are relied on by the attorney general to sustain his contention that the brewing company had no such right; but in the view we take of the case it is only necessary to consider one of them.

By section 14 of the charter of Manassas (Acts 1901-2, p. 216; Acts 1906, p. 204), it is provided, that "no license shall

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be granted to any person, club or corporation to sell ardent spirits, malt liquors, or any mixture thereof, or any bitters containing alcohol, either by wholesale or by retail, or to be drunk at the place where sold, within the corporate limits of said town, unless the applicant shall first produce before the court authorized to grant such license the written consent of the town council that the applicant is a corporation under the laws of some State of the United States, or that the person is sober, discreet and of good moral character, and that the place is suitable and convenient, and such certificate shall further show that the said applicant has paid into the town treasury a sum not less than seventy-five dollars nor more than the sum of three hundred dollars, as shall be prescribed by the said council \* \* \*."

By section 28 of chapter 189 of the Acts of 1908, it is provided, that nothing in this act shall be construed as changing the provisions of the charter of any town or city touching the granting of licenses.

If "malt beverage" be a malt liquor or a mixture thereof, then under the provisions of the charter of the town of Manassas no license could be granted for its sale therein except with the consent of the town council and a compliance with the other provisions of the charter. That there was no such compliance is clear from the facts agreed. While "malt beverage" as defined by section 23½ of the Byrd law is not intoxicating, it is a malt liquor. It seems to be well settled that the general term "malt liquors" includes both intoxicating and non-intoxicating malt liquors.

Black, in his article on Intoxicating Liquors in 23 Cyc. 41. 60, says, that "if the statute specifically forbids the unlicensed sale of malt liquors, the question of the intoxicating properties of the liquor sold is immaterial; it is only necessary to determine whether it was a malt liquor." *Eans v. State*, 113 Ga. 749, 39 S. E. 818, 821.

See also the following cases, where it was held that if the law prohibits or regulates the sale of "cider" by name, without

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any qualifying word, it applies to all cider, without regard to its intoxicating qualities. *Com. v. Dean*, 14 Gray (Mass.) 99; *State v. Roach*, 75 Maine, 123; *State v. Spalding*, 61 Vt. 505, 17 Atl. 844.

In *State v. Kauffman*, 68 Ohio, 635, 67 N. E. 1062, it was held that a malt beverage which contained less than two and one-quarter *per cent.* of alcohol, and which was not intoxicating, was embraced within the meaning of an act which related to trafficking in spiritous, vinous, malt and intoxicating liquors. See *U. S. v. Ducournau* (C. C.), 54 Fed. 138, 139; *U. S. v. Cohen*, 2 Ind. Ter. 475, 52 S. W. 38.

"Malt beverage" being a malt liquor, within the meaning of the charter of the town of Manassas forbidding its sale without a license acquired in the manner prescribed by the charter, the accused had no right to sell it in that town, even if the effect of section 30 of the Byrd law, as contended by the counsel of the defendant, were to repeal section 587 of the Code, so far as it forbids the sale of "malt beverage" in no-license territory.

It is insisted by the defendant that section 23½ of the act known as the "Byrd law" is unconstitutional. If it were, the result in this case would be the same, since he is not convicted of the violation of any of its provisions.

The judgment of the circuit court must, therefore, be reversed, and this court will enter such judgment as the circuit court ought to have entered.

*Reversed.*



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**Richmond.****SUTHERLAND V. COMMONWEALTH.**

June 17, 1909.

1. **CONCEALED WEAPONS—Pistol in Saddlebags—"About His Person"—Constructive Offenses.**—A pistol in a scabbard and in a pair of saddlebags, with the lids down, though the saddlebags be in the hand, does not fall within the language of the statute which says: If a person carry about his person hid from common observation any pistol," etc. The words "about his person" must mean that it is so connected with the person as to be readily accessible for use or surprise, if required. The act described must be within the spirit and letter of the statute in order to constitute a crime, and this is neither. There are no constructive offenses.

Error to a judgment of the Circuit Court of Dickinson county.

*Reversed.*

The opinion states the case.

*S. H. Sutherland*, for the plaintiff in error.

*Attorney General Wm. A. Anderson*, for the Commonwealth.

HARRISON, J., delivered the opinion of the court.

In this case the accused was charged with unlawfully carrying about his person a pistol which was concealed from common observation.

The evidence in support of this charge is that the accused placed a pistol, encased in its scabbard, in a pair of saddle-bags, pulled the lids of the saddle-bags down, hiding the pistol from

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view, and carried the saddle-bags in his hand down the road until out of sight.

The question presented is whether or not it is a violation of the statute against carrying concealed weapons for a man to carry in his hand a pair of saddle-bags containing a pistol, which is hidden from common observation.

So much of the statute as is necessary to the consideration of this question is in these words: "If any person carry about his person hid from common observation, any pistol, \* \* \* he shall be fined not less than \$20.00 nor more than \$100.00." Acts 1908, p. 381.

This is a penal statute, and it is an ancient maxim of the law that all such statutes must be construed strictly against the State and favorably to the liberty of the citizen. The maxim is founded on the tenderness of the law for the rights of individuals, and on the plain principle that the power of punishment is vested in the legislature and not in the judicial department. No man incurs a penalty unless the act which subjects him to it is clearly within the spirit and letter of the statute which imposes such penalty. There can be no constructive offenses, and before a man can be punished his case must be plainly and unmistakably within the statute. If these principles are violated, the fate of the accused is determined by the arbitrary discretion of the judges and not by the express authority of the law. *Harris v. Com'th*, 81 Va. 240, 59 Am. Rep. 666; *Lascalzett v. Com'th*, 89 Va. 878, 17 S. E. 546; *United States v. Wiltberger*, 5 Wheat. 76, 5 L. Ed. 37.

In the light of this fundamental rule of construction, we are of opinion that the question raised by this record must be answered in the negative. The purpose of the statute was to interdict the practice of carrying a deadly weapon about the person, concealed, and yet so accessible as to afford prompt and immediate use. "About the person" must mean that it is so connected with the person as to be readily accessible for use or surprise if desired. A pistol in a scabbard and in a pair of

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saddle-bags with the lids down, though the saddle-bags be in the hand, does not fall within the language of the statute, which says: "If a person carry about his person, hid from common observation, any pistol," etc.

Evidence that the defendant had a pistol concealed under a rug in the bottom of the buggy in which he was riding was held not to be sufficient to convict him of carrying a pistol concealed about his person. *Ladd v. State*, 92 Ala. 58, 9 South, 401.

Evidence that the defendant had a pistol concealed in saddle-bags while riding along the public road was held not to be sufficient to convict him of carrying a pistol concealed about his person. *Cunningham v. State*, 76 Ala. 88.

The act of which the accused stands convicted in this case does not come within the spirit, and certainly not within the letter of the statute, which it must do.

As said by Chief Justice Marshall in *U. S. v. Wiltberger*, *supra*, "it would be dangerous indeed to carry the principle that a case which is within the reason or mischief of a statute, is within its provisions, so far as to punish a crime not enumerated in the statute because it is of a kindred character with those which are enumerated."

If the statute be less comprehensive than the legislature intended, it is for that body to extend its operation and not for the courts to do so.

The judgement must be reversed, the verdict of the jury set aside, and the case remanded for a new trial not in conflict with this opinion.

*Reversed.*

## Statement.

**Wytheville.**

## WITHERS V. COMMONWEALTH.

June 17, 1909.

1. **CONCEALED WEAPONS**—*Commissioners in Chancery*—Code (1904, as Amended, Section 3780, Construed.—Commissioners in chancery are conservators of the peace (Code, section 3912), and as such may carry concealed weapons, although not at the time acting in the discharge of official duty. The words "while in the discharge of his official duty" used in section 3780 of the Code as amended, apply only to the next antecedent class of officers, to-wit, collecting officers, and not to the other officers named in the statute.
2. **STATUTES**—*Construction*—*Punctuation*—*Concealed Weapons*—*Case at Bar*.—Punctuation is not resorted to in the interpretation of statutes unless the intention of the legislature cannot be ascertained from the language of the statute (read in the light of legislation existing upon the subject when the statute to be interpreted was enacted), and of other statutes *in pari materia*. In the case at bar, it is not necessary to invoke the aid of punctuation. The statute concerning the carrying of concealed weapons, read in the light of its history, is sufficiently plain.
3. **CRIMINAL STATUTES**—*Strict Construction*—*Constructive Offenses*.—Criminal statutes are construed strictly against the State and in favor of the liberty of the citizen. No man incurs a penalty unless the act which subjects him to it is clearly within the spirit and letter of the statute which imposes such penalty. There are no such things as constructive crimes.

Error to a judgment of the Circuit Court of Bedford county.

*Reversed.*

S. S. Lambert, Jr., and Martin P. Burks, for the plaintiff in error.

Attorney General Wm. A. Anderson, for the Commonwealth.

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CARDWELL, J., delivered the opinion of the court.

The accused, R. W. Withers, was charged with unlawfully carrying about his person a pistol which was concealed from common observation.

The undisputed facts out of which the prosecution arose are as follows: The accused, at the date of the alleged offense, was a commissioner in chancery duly appointed by the Circuit Court of Bedford county, and on the 11th day of August, 1908, accompanied by a friend, he made a trip from Bedford City to the Peaks of Otter on horseback, and took with him a pistol, which was in a holster attached to his vest; the pistol being taken for the purpose of furnishing the accused and his friend with some diversion in target shooting while on the mountain. The accused was not in the habit of carrying a pistol, and had no reason for doing so on this occasion other than that mentioned, and he states that he would not have done so at that time but for the fact that he had himself examined into the law and upon his investigation of the statute he reached the conclusion that he was permitted to carry a weapon because of the fact that he was a commissioner in chancery, and as such a conservator of the peace. Upon his return from the mountain, and just after he had dismounted from his horse at the livery stable, the accused took the pistol from the holster and, exhibiting it to an officer who happened to be standing by, with whom he was on friendly terms, jocularly remarked that he was carrying a concealed weapon, and that he (the officer) had better arrest him; whereupon, on the 14th day of August, 1908, a warrant of arrest was issued upon the complaint of the officer mentioned.

Upon the trial of the charge in this warrant in the justice's court, the accused was found guilty and adjudged to pay a fine of \$50 and costs, from which judgment the accused appealed to the circuit court, and the latter, upon the hearing of the cause without the intervention of a jury, sustained the judgment of the justice convicting the accused of carrying a concealed

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weapon, but was of opinion that as the violation of the statute was technical only the fine imposed by the justice should be reduced to the minimum prescribed by the statute, \$20.00; and to that judgment of the circuit court this writ of error was awarded.

The statute under which the accused was convicted had its origin in an act passed by the legislature in 1838 (Acts 1838, p. 76), and has been a number of times amended, so that it now appears as section 3780 of the Code of 1904, as amended by an act of the legislature approved March 14, 1908 (Acts 1908, p. 671), which so far as material in this case is as follows:

"If any person carry about his person, hid from common observation, any pistol, \* \* \* he shall be fined not less than twenty dollars, nor more than one hundred dollars, and in the discretion of the court or jury trying the case may be, in addition thereto, committed to jail for not more than six months, and such pistol \* \* \* shall be forfeited to the Commonwealth \* \* \*; provided, that this section shall not apply to any police officer, town or city sergeant, constable, sheriff, conservator of the peace, or to carriers of United States mail in rural districts, or collecting officer while in the discharge of his official duty \* \* \*."

It will be seen, therefore, that the question presented is the proper construction of the statute just quoted—that is, do the words "while in the discharge of his official duty," following the words "collecting officer," and without being separated by even a comma, apply to all of the officials named in the statute, or only to a "collecting officer?"

As said by Harrison, J., in construing this statute, in *Sutherland v. Commonwealth*, handed down at the present term, *ante*, p. 834, 65 S. E. 15, "it is an ancient maxim of the law that all such statutes must be construed strictly against the State and favorably to the liberty of the citizen. The maxim is founded on the tenderness of the law for the rights of individuals, and on the plain principle, that the power of punishment is vested

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in the legislature and not in the judicial department. No man incurs a penalty unless the act which subjects him to it is clearly within the spirit and letter of the statute which imposes such penalty. There can be no constructive offenses, and before a man can be punished his case must be plainly and unmistakably within the statute. If these principles are violated, the fate of the accused is determined by the arbitrary discretion of the judges and not by the express authority of the law."

Applying this maxim of the law to this case, we do not deem it necessary to follow at length the learned arguments submitted both on behalf of the accused and the Commonwealth, since, when read in the light of the statutes preceding it and other statutes *in pari materia*, there seems to be no difficulty in ascertaining the intention of the legislature in the enactment of the statute as above quoted.

As the statute formerly stood, the words "while in the discharge of his official duty," did not appear until "collecting officer" was added to the officials theretofore named in the statute, and the statute so remained until amended and re-enacted in the Code of 1887, and this amendment consisted of the mere paraphrase of the section as amended by the act of February 22, 1884 (Acts 1883-84, p. 180), and was not designed to change the meaning and effect of that act and did not in fact do so.

It is true that a comma is found in the last named amendment, after the words "collecting officer" and before the words "while in the discharge of his official duty," but the section was twice amended by the legislature of 1908, and in both of these amendments the comma was omitted. We do not think, however, that this is a matter of any importance, as punctuation is not resorted to in the interpretation of statutes, unless the intention of the legislature cannot be ascertained from the language of the statute read in the light of legislation existing upon the subject when the statute to be interpreted was enacted and

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other statutes *in pari materia*; and in this case we do not think it necessary to invoke the aid of punctuation.

The first amendment of section 3780 of the Code of 1904 was approved March 13, 1908 (Acts 1908, p. 381), and that amendment related only to the first proviso, being as follows: "Provided, that this section shall not apply to any police officer, town or city sergeant, constable, sheriff, conservator of the peace, collecting officer while in the discharge of his official duty, or carrier of United States mail in rural districts while in the discharge of his duty."

It will be observed that the legislature there inserted the qualifying clause "while in the discharge," etc., after two classes of officers named in the statute, to-wit, collecting officer and carriers of United States mail, and it is inconceivable that the legislature would have done this if these qualifying words were to be applied to all of the officers named in the proviso, since there was no necessity for annexing the qualifying words to two classes of officers and not annexing it to other officers if the statute could be construed so as to apply the qualifying words to all of the officers named. It is manifest, we think, that the legislature considered the qualifying words in this amendment of section 3780 of the Code as relating only to the next antecedent class of officers, namely, collecting officers; and that it deemed it necessary, in order to apply these qualifying words to another class of officers, namely, rural mail carrier, to annex the qualification "while in the discharge of his official duty."

This construction of section 3780 by the legislature is, we think, made more manifest by the amendment of that section approved March 14, 1908, *supra*. It is there made plain that the legislature did not think the qualifying clause "while in the discharge," etc., should apply to mail carriers, but only to collecting officers, and therefore struck out the clause as to mail carriers and placed them in the statute ahead of "collecting officer"; so that the proviso would read, "this section shall not



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apply to any police officer, town or city sergeant, constable, sheriff, conservator of the peace, or to carriers of United States mail in the rural districts, or collecting officer while in the discharge of his official duty."

As suggested by the learned counsel for the accused, it could not be reasonably contended that the qualifying clause "while in the discharge," etc., in the act as it now stands, applies to United States mail carriers, for the reason that the legislature put the qualification in as to mail carriers in the act approved March 13, 1908, and deliberately struck it out in the amendment approved March 14, 1908; and that any other construction of the statute would impute to the legislature ignorance of the elemental principles of the English language, in that it would make a *singular* possessive refer to a *plural noun*, and have the antecedent of the qualifying clause to read as follows: "or to *carriers* of United States mail in the rural districts \* \* \* in the discharge of *his* official duty."

Furthermore, had it been the intention of the legislature when it enacted the amended statute we are now considering, that the qualifying clause, "while in the discharge of his official duty," should apply to all the officials named in the first proviso, including mail carriers, would not the word "and" have been used instead of "or" just before the words "collecting officer," and the word "their" instead of "his" just before the word "duty," and the qualifying clause made to read: "this section shall not apply to a police officer, town or city sergeant, constable, sheriff, conservator of the peace, carriers of United States mail in the rural districts *and* collecting officers while in the discharge of *their* official duty, or while in the discharge of *their respective official duties*"? Unquestionably so, as it appears to us.

As far back as the Code of 1873, p. 1222, every judge throughout the State, and every justice, commissioner in chancery and notary within his county or corporation, were made conservators of the peace; and so the statute remained until amended by Acts of 1891-2, p. 980, by the addition of the words

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"and county surveyor while in the performance of the duties of his office." It would hardly be contended that the qualifying clause following "county surveyor" applied to all of the officials named in the statute, so that they would be conservators of the peace only "while in the performance of the duties of his office."

It was doubtless considered by the legislature in first inserting in the statute enacted to prevent the carrying of concealed weapons, the proviso we have been considering exempting certain named officials from the operation of the statute, and in preserving that proviso, that the officials named were worthy of confidence and could be trusted in the exercise of the right to carry a concealed weapon whenever such official deemed it necessary for him to do so as a conservator of the peace. It is a privilege accorded to the official named in the statute, which may be and has doubtless been abused, but that is a matter to be dealt with by the law-making power and not by the courts in the construction of the statute.

As we have seen, before a citizen can be punished his case must come plainly and unmistakably within the statute. Even if the case could be brought within the reason or mischief of the statute, it would not be sufficient to justify the infliction of punishment for a violation thereof. *Sutherland v. Com'th*, *supra*, and authorities there cited.

That principle controls this case, and it is illustrated in the case of *Gates & Son v. Richmond*, 105 Va. 702, 49 S. E. 765, where the city ordinance imposed a fine upon any person who constructed or placed a portico, porch, door, window, step, fence, "or other projection which shall project into any street"; and the plaintiff in error placed a temporary skid across the sidewalk for the purpose of unloading, and for doing so the police justice imposed a fine for violation of the ordinance; which judgment of the police justice was affirmed by the Hustings Court of the city of Richmond; but this court reversed it upon a writ of error. The opinion of this court says: "This is a

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penal ordinance and is, therefore, to be construed strictly. It is not to be extended by implication, and must be limited in its application to cases clearly described by the language employed. The books abound with cases illustrating this principle, which is of universal application, except in particular instances in which the doctrine has been modified by statute."

We are of opinion that the statute we have under consideration does not admit of the construction placed upon it by the learned judge of the circuit court, but that it was plainly the purpose and intention of the legislature to apply the qualifying clause found in the first proviso of the statute which we have quoted above to "collecting officer" and not to the other officials named in the statute.

It follows, therefore, that the judgment of the circuit court must be reversed and annulled, and the prosecution dismissed.

*Reversed.*

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**Wytheville.**

## DONITHAN V. COMMONWEALTH.

June 17, 1909.

**1. INTOXICATING LIQUORS—*Spirituous. Liquors—Intoxicating Cider.*—**

Under an indictment for the unlawful sale of "spirituous and malt liquors, whiskey, brandy, wine, ale, beer or mixtures thereof," the defendant cannot be convicted on proof of the sale of intoxicating cider. Cider is not a spirituous liquor, nor does it belong to any of the other classes enumerated. While all spirituous liquors are intoxicating, and all intoxicating liquors are, by force of the act of March 12, 1908, deemed to be ardent spirits, it is certain that all ardent spirits are not spirituous liquors. Malt liquors are intoxicating, but cannot be classified as spirituous.

Error to a judgment of the Circuit Court of Pulaski county.

*Reversed.*

The opinion states the case.

*H. C. Gilmer and J. L. Wysor*, for the plaintiff in error.

*Attorney General Wm. A. Anderson*, for the Commonwealth.

KEITH, P., delivered the opinion of the court.

Donithan was indicted in the Circuit Court of Pulaski county for the unlawful sale by retail of "spiritous and malt liquors, whiskey, brandy, wine, ale, beer, or mixture thereof." Upon the trial the evidence failed to prove the sale of any of the articles specifically mentioned in the indictment, but evidence was

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admitted of the sale of cider which produced intoxication, and upon this proof the jury rendered a verdict against the defendant, and fixed his fine at \$50.00, upon which judgment was entered.

During the progress of the trial the defendant excepted to the ruling of the court allowing the witness to testify as to the sale of intoxicating cider, upon the ground that no such offense was charged in the indictment, and this ruling presents the only question which need be here considered.

The sale of cider cannot be brought within the terms of the indictment unless cider is to be considered a spirituous liquor, as it certainly is not a malt liquor, whiskey, brandy, wine, ale, beer, or any mixture thereof.

Section 1 of the act of Assembly, approved March 12, 1908 (Acts 1908, p. 275), declares, that "all mixtures, preparations and liquors which will produce intoxication shall be deemed ardent spirits, within the meaning of this act."

If, therefore, the term "ardent spirits" had been used in the indictment, there would have been room to contend (though we do not here decide) that the charge would have been supported by the proof of sale of any mixture, preparation or liquid which would produce intoxication. But while all spirituous liquors are intoxicating, and all intoxicating liquors are by force of the statute ardent spirits, it is certain that all ardent spirits are not spirituous liquors. Malt liquors, for instance, are intoxicating, but cannot be classified as spirituous. 17 A. & E. Enc. L. 203; *State v. Oliver*, 26 W. Va. 422, 53 Am. Rep. 79; *Commonwealth v. Livermore*, 4 Gray, 20; *Feldham v. Morrison*, 1 Ill. App. 460.

We are of opinion that the indictment does not warrant proof of the sale of cider.

It follows that the judgment of the circuit court must be reversed, and the cause remanded for further proceedings to be had therein not in conflict with this opinion.

*Reversed.*

## Syllabus.

**Wytheville.**

## WRIGHT V. COMMONWEALTH.

June 24, 1909.

1. **CRIMINAL LAW—Cumulative Punishment—Indictment for Murder—Code, Sections 3905, 3906.**—The cumulative punishment provided by sections 3905 and 3906 of the Code for habitual offenders applies solely to cases where the accused is indicted and prosecuted for offenses punishable by confinement in the penitentiary, and not to indictments and prosecutions for capital felonies, though in such cases the jury may, in their discretion, find the accused guilty of a lesser offense. The statutes are highly penal and do not apply to cases which *may*, but to those which *must*, upon a strict construction, come within their language.
2. **CRIMINAL LAW—Indictment for Murder—Cumulative Punishment.**—If, on an indictment for murder, the prisoner be found guilty of an offense less than murder of the first degree, and sentenced to confinement in the penitentiary, the cumulative punishment provided by sections 3905 and 3906 may be added by proceedings had under sections 4180, 4181, 4182 and 4183 of the Code which are complementary to the prior sections, prevent a possible failure of justice, and spare the accused the injustice of having evidence of prior offenses introduced before the jury when upon trial for murder of the first degree.
3. **CRIMINAL LAW—Indictment for Murder—Count Charging Former Conviction of Felony—Surplusage—Evidence of Former Conviction.**—An indictment for murder is not bad on demurrer because it contains a count charging that the accused had been twice before sentenced in the United States to confinement in the penitentiary. The count charging the previous convictions must be rejected as surplusage. But if the prisoner objects to the introduction of evidence of such former convictions, his objection should be sustained, as such evidence tends to unduly prejudice the prisoner before the jury.
4. **CRIMINAL LAW—Evidence—Dying Declarations—Motive for Killing.**—The dying declaration of deceased that he did not know any motive on the part of the prisoner for shooting him, except that

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he was angry because deceased had refused to rent him a piece of land, is admissible in evidence, though not conclusive of the fact; and it is competent for the prisoner to contradict it by showing that he was not informed of the purpose of the deceased with respect to the land until after the homicide had been committed.

5. **CRIMINAL LAW—Evidence—Remarks of Prisoner in Jail—Motive.**—On a trial for murder, it is competent for the Commonwealth to prove remarks of the prisoner while in jail that “he did not begrudge what he had done (though he did not say what he had done) \* \* \*, that he had it to do, and if it were to do over again he would do it.” Although he did not mention the name of the deceased in that connection, yet if he had reference to some other transaction it was competent for him to show it.
6. **CRIMINAL LAW—Instructions—Case at Bar.**—The instructions given in the case at bar are approved by the court. They relate to murder, malice, manslaughter, presumptions, reasonable doubt, self-defence, dying declarations, etc.

Error to a judgment of the Circuit Court of Dickenson county.

*Reversed.*

The following instructions were given on the trial:

“1. The court instructs the jury, that murder is the unlawful killing of any person with malice aforethought.

“2. Murder is distinguished by the law of Virginia as murder in the first degree and as murder in the second degree.

“3. The court instructs the jury, that whenever a killing is wilful, deliberate and premeditated, the law infers malice from this fact.

“4. The court instructs the jury, that murder in the first degree is any wilful, deliberate and premeditated killing with malice aforethought.

“5. The court instructs the jury, that to constitute a wilful, deliberate and premeditated killing it is not necessary that the intention to kill should exist for any particular length of time before the killing; it is only necessary that such intention should

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come into existence for the first time at the time of the killing, or at any time previous.

"6. The court instructs the jury, that the rule of law is that a man shall be taken to intend that which he does, or which is the necessary consequence of his act.

"7. The court instructs the jury, that on a trial for murder the law of self-defense is the law of necessity, and the necessity relied on to justify the killing must not arise out of the prisoner's own misconduct, and that the prisoner can not justify the killing of the deceased by a plea of necessity upon himself.

"8. The court instructs the jury, that if they believe from the evidence beyond a reasonable doubt that Elijah Wright wilfully, deliberately, maliciously and premeditatedly shot and killed William Sifers, he is guilty of murder in the first degree and the jury should so find.

"9. The court instructs the jury, that as a matter of law, in considering the case, the jury are not to go beyond the evidence to hunt up doubts; nor must they entertain such doubts as are merely imaginary. A doubt, to justify an acquittal, must be a reasonable doubt, and it must arise from a candid and impartial investigation of all the evidence in the case. If, after considering all the evidence, you can say that you have an abiding conviction of the truth of the charge, then you are satisfied beyond a reasonable doubt.

"10. The court further instructs the jury, that if they believe from the evidence in this case beyond a reasonable doubt that the defendant, Elijah Wright, said in the hearing of William Sifers that 'Bill Sifers has been trying to agg up a racket all day,' and that the said William Sifers said to him that 'you are a liar,' and that the said defendant replied that 'you are another,' and immediately began to advance on the deceased with a knife in his hand, and that the deceased told him to stop, and shot in the ground near the defendant for the purpose of preventing the defendant from making an assault upon him with said knife, and that the said defendant thereupon forcibly dis-



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armed the deceased, and after he had so disarmed him then and there wilfully, maliciously, deliberately, and premeditatedly shot and killed the said William Sifers as is charged in the indictment, he is guilty of murder in the first degree, and the jury should so find.

"12. The court further instructs the jury, that murder is the killing of any person with malice aforethought, either express or implied. Malice in this definition is used in a technical sense, and includes not only anger, hatred, and revenge, but every unlawful and unjustifiable motive. It is not confined to ill-will to any one or more individual persons, but is intended to denote an action flowing from any wicked or corrupt motive and thing done with an evil mind and purpose and wrongful intention, where the act has been attended with such circumstances as to carry in them the plain indication of a heart regardless of social duty and fatally bent on mischief, and therefore malice is implied from any deliberate or cruel act against another, however sudden.

"13. The court tells the jury, that dying declarations, when deliberately made under the solemn sense of impending dissolution, and concerning circumstances in respect of which the deceased was not likely to have been mistaken, are entitled to as great weight, if precisely identified, as if the deceased had been living and sworn in court and had testified the same as said dying declaration.

"14. The court tells the jury, that they are the exclusive judges of the credibility of the witnesses, and the weight to be given their testimony, but that they have no right to arbitrarily disregard the testimony of any witness; but in determining the credibility of witnesses, and the weight to be given their testimony, the jury must take into consideration the interest of the witness in the thing about which he testifies, his means of knowledge, bias, and prejudice in regard to the thing about which he testifies and his demeanor while testifying. And, when the jury have considered the testimony of witnesses according to

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these principles, they should give to the testimony of each witness all the weight to which his testimony is entitled, if any."

*Datson & Bond*, for the plaintiff in error.

*Wm. A. Anderson, Attorney General*, for the Commonwealth.

WHITTLE, J., delivered the opinion of the court.

This writ of error brings under review a judgment of the Circuit Court of Dickenson county of conviction of the plaintiff in error, Elijah Wright, of murder of the first degree.

In addition to the charge of murder of the first degree the indictment alleges that the accused had been twice before sentenced in the United States to confinement in the penitentiary.

There was a demurrer to the indictment which the court overruled; so that we are met at the threshold of the case with the inquiry, whether in a prosecution for murder of the first degree the allegation of previous convictions for felony is permissible under sections 3905 and 3906 of the Code.

Section 3905 is in these words: "When any person is convicted of an offense, and sentenced to confinement therefor in the penitentiary, and it is alleged in the indictment on which he is convicted, and admitted, or by the jury found, that he had been before sentenced in the United States to a like punishment, he shall be sentenced to be confined five years in addition to the time to which he is or would be otherwise sentenced."

And section 3906 provides: "When any such convict shall have been twice before sentenced in the United States to confinement in the penitentiary, he shall be sentenced to confinement in the penitentiary for life."

It has long been the policy of this Commonwealth to visit with cumulative punishment habitual offenders who come within the terms of these enactments. (The first statute on the subject was passed December 15, 1796. 2 Stat. at Large [New

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Series], 1796-1802, sec. 24, p. 9.) We think, however, that both the phraseology and intendment of the present provisions preclude the possibility of their application to a prosecution for a capital felony, and demand that their operation be limited strictly to indictments for offenses punishable by confinement in the penitentiary only.

It is true that in a prosecution for murder of the first degree, upon the principle that an indictment for the greater includes the lesser offenses, the jury may in their discretion find the accused not guilty of murder of the first degree, but guilty of murder of the second degree or of voluntary manslaughter—both of which crimes are punishable by imprisonment in the penitentiary; or they may acquit of the felony and find him guilty of involuntary manslaughter, or of assault and battery. Yet it is likewise true, that if the accused be found guilty of murder of the first degree, as was done in this instance, then sections 3905 and 3906, manifestly can have no application to the case, because the statute unconditionally imposes the death penalty for that offense.

We conceive, therefore, that the only fair and reasonable construction that can be placed on the sections quoted is that they apply solely to cases where the accused is *indicted and prosecuted* for offenses punishable by confinement in the penitentiary, and not to indictments and prosecutions for capital felonies, though in such cases the jury may in their discretion find the accused guilty of a lesser offense.

These enactments, it must be remembered, are in a high degree penal, and consequently may not be extended by construction to cases not clearly within the language employed. *Jennings v. Com'th*, ante, p. 821, 63 S. E. 1080, 3 Va. App. 192; *Sutherland v. Com'th*, decided at the present term, ante, p. 834, 65 S. E. 15.

In the latter case, Judge Harrison, speaking for the court, says: "This is a penal statute, and it is an ancient maxim of the law that all such statutes must be construed strictly against

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the State and favorably to the liberty of the citizen \* \* \*. There can be no constructive offenses, and before a man can be punished his case must be plainly and unmistakably within the statute."

The rule is thus stated in 12 Cyc. 949, under the title, "Successive Offenses and Habitual Criminals": "Statutes under which more severe punishment may be inflicted upon the accused when the crime of which he is convicted is a second or subsequent offense, being highly penal, should not be extended in their application to cases which do not by the strictest construction come under their provisions."

The same principle is strongly stated by Shaw, C. J., in *Ex parte Seymore*, 14 Pick. (31 Mass.) 40.

The doctrine fairly deducible from the authorities seems to be that such enactments do not apply to cases which *may*, but to cases which *must*, upon a strict construction, come within their language.

The subject is also quite fully treated in 8 Am. & Eng. Ency. of Law, 479, *et seq.*, under the head of "Cumulative Punishment," and in none of the numerous decisions there assembled, so far as we have had opportunity to examine them, has the rule been attempted to be applied to a prosecution, the primary purpose of which was to inflict capital punishment upon the accused. Indeed, the incongruity of such application would seem obvious. There can, of course, be no cumulative punishment in a capital case, and the manifest design and purpose of the legislature, as we have seen, was to prevent the repetition and increase of crimes by imposing additional imprisonment upon habitual offenders for successive offenses. But we cannot suppose that the legislature intended that the salutary statutes should be used to prejudice a prisoner on trial for his life, by opening wide the door to the admission of evidence of distinct offenses, tending, at least, to establish the bad character of the accused by showing that he is an old offender, on the theory that in a prosecution of that sort it is possible for the

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jury to find him guilty of an offense within the statute. If such construction were permissible, it might not infrequently result in the conviction of the accused of a capital felony upon evidence wholly inadmissible to establish his guilt. Surely, in the interpretation of these extremely penal statutes, the courts would not be warranted in adopting a construction which would render such a result possible.

It was not the intention of the statute, even in cases to which it applies, by the introduction of proof of former convictions, to supply substantive evidence of the guilt of the accused in the principal case, but only to enhance the punishment in the event his guilt should be proved by independent testimony.

In *Rand's Case*, 9 Gratt. 738, the accused was indicted for burglary and larceny under the Code of 1849, and the indictment also contained an allegation that he had been previously convicted of a felony in the Commonwealth of Massachusetts and sentenced therefor to confinement in the penitentiary. The statutory punishment for burglary was at that time confinement in the penitentiary not less than five, nor more than ten years. Code, 1849, ch. 192, sec. 11, p. 728.

In 1796, the legislature passed "An act to amend the penal laws of the Commonwealth," which provided for the establishment of the penitentiary, and the first section of which declared that "no crime whatsoever committed by any free person against this Commonwealth (except murder of the first degree), shall be punished with death within the same." This remained the law as to burglary until February 7, 1866, when the crime was made punishable with death, or, in the discretion of the jury, by confinement in the penitentiary. Acts of 1865-6, p. 90. As remarked, in the revision of 1796, provision was made for cumulative imprisonment for second convictions, and, in one form or another, such enactments have constituted part of our statute law hitherto.

In *Rand's Case*, the indictment failed to set out the time and place of the alleged former conviction, or that it was for an

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offense committed before the commission of that for which the prisoner was on trial. Consequently, the court held evidence of the prior conviction inadmissible, because only applicable to the faulty count; and for the error of the trial court in admitting this illegal testimony, over the general objection of the accused, set aside the whole judgment, and awarded a new trial. It was said that the motion of the accused to exclude the record of the former conviction, "was though not in terms, in substance and effect, a motion to the court to instruct the jury to disregard that portion of the indictment alleging such conviction." In discussing the effect of the admission of such evidence, Daniel, Judge, at page 752, observes: "What is the effect of this error of the court? On the one hand it is argued by the attorney general that it should only affect so much of the judgment as relates to the additional punishment; and on the other hand it is insisted by the prisoner's counsel that it is cause for reversing the whole judgment, and remanding the case for a new trial. We can hardly say that the introduction of the evidence objected to was not calculated to prejudice the prisoner in the trial of the felony for which he was arraigned." He then quotes the language of Park, Judge, in *Rex v. Jones*, 25 Eng. C. L. R. 453, "that if the jury were aware of the prisoner's conviction it was (to use a common expression) like trying a man with a rope about his neck."

Continuing, the learned judge, at page 755, says: "What influence the evidence may have had in deciding the question of the guilt or innocence of the prisoner of the charges of burglary and larceny, for which he was on his trial, no one can say. But it is not difficult to believe that, in a case of doubtful or conflicting evidence, such proofs might exert an influence on the minds of the triers prejudicial to the cause of the prisoner. And we think the error in permitting the evidence to go to the jury cannot be regarded as cured by the statement which it appears was made by the judge to the jury, that the records were admitted and were to be received for the sole purpose of

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showing that the prisoner had been previously convicted of a felony. Such a caution, though highly proper and calculated to guard the jury against yielding to any improper bias, could not wholly remove the unfavorable impressions which the introduction of the evidence must, most probably, have made on their minds. The allegation of the first conviction being faulty, the prisoner had the right to stand before his triers in the same plight as if such allegation had never been made. And if, upon his trial on an indictment containing no such charge, evidence such as that objected to had been introduced, there can be no doubt that its introduction would have been error entitling the prisoner to a new trial."

If this result should follow in a prosecution in which the evidence would have been admissible had the allegation of the first conviction not been faulty, with how much more reason should it apply in a prosecution for a capital felony, in which such evidence was not admissible in any aspect of the case?

It has been suggested that the construction we have given the statute would result in a miscarriage of justice, in the event the jury should find the prisoner guilty under the indictment of a less offense than murder of the first degree; that the evidence of prior offenses being excluded, the jury could not add the additional punishment required by the statute when the accused was found guilty of the lesser offense. This difficulty is, we think, removed by sections 4180, 4181, 4182 and 4183 of the Code.

Section 4180 provides: "When a person convicted of an offense, and sentenced to confinement therefor in the penitentiary, is received therein, if he was before sentenced to a like punishment, and the record of his conviction does not show that he has been sentenced under section thirty-nine hundred and five, or thirty-nine hundred and six, the superintendent of the penitentiary shall give information thereof, without delay, to the said Circuit Court of the city of Richmond, whether it be alleged or not in the indictment on which he was so convicted.

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that he had been before sentenced to a like punishment." And the other sections provide for the imposition of the additional punishment.

These complementary sections prevent a possible failure of justice in the instance suggested, and at the same time the accused is spared the injustice of having evidence of prior offenses introduced before the jury where he is upon trial for murder of the first degree.

For the foregoing reasons, we are of opinion that the objection of the prisoner to the introduction of evidence of former convictions in the State of Kentucky ought to have been sustained.

This view does not, however, vitiate the indictment. It is a good indictment for murder of the first degree, and the allegations of previous convictions must be treated as surplusage; and in that aspect of the case the demurrer to the indictment was properly overruled.

The next assignment of error is to the action of the court in overruling the objection of the prisoner to the last question and answer in the testimony of Robert K. Harris, a witness for the Commonwealth, which undertook to give the dying declaration of the deceased, that he did not know of any motive on the part of the prisoner for shooting him, except that he was angry because the deceased had refused to rent him a certain piece of land.

This we think was admissible, though not conclusive evidence of the fact alleged, and it was competent for the accused to contradict it, as he sought to do, by showing that he was not informed of the purpose of the deceased with respect to the land until after the homicide had been committed. The issue of fact thus raised was a proper one for the consideration of the jury upon all the evidence bearing upon the question.

Nor did the court err in admitting the testimony of witnesses in regard to remarks of the accused while in jail, that "he did not begrudge what he had done (though he did not say what



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he had done) \* \* \*, that he had it to do, and if it were to do over again he would do it." It is true he did not mention the name of the deceased in that connection, yet if he had reference to some other transaction it was competent for him to show it. The evidence, though possibly of no great value, was rightly admitted.

The remaining assignment of error which demands consideration deals with instructions. Without undertaking to examine them in detail, it is sufficient to say that, when read together, the instructions given by the court fully and fairly stated the law of the case, both from the standpoint of the Commonwealth and of the accused. Of course, those in reference to alleged former convictions of the accused must be omitted.

As a new trial is to be granted, we shall refrain from expressing any opinion as to the weight or sufficiency of the evidence.

The judgment of the circuit court, for error in the admission of evidence of former convictions, must be reversed, the verdict of the jury set aside, and the case remanded for a new trial to be had not in conflict with the views herein expressed.

KEITH, P., dissenting:

I agree with the opinion of the court upon the demurrer to the indictment, and as to the several assignments of error which it overrules. I am constrained, however, to dissent from so much of the opinion as holds that section 3905 of the Code does not apply where a capital offense is charged in the indictment, and that, while the allegation of such former offense in an indictment for a capital offense may be treated as surplusage and the indictment sustained, it is error to admit proof of such former offense, the principal reason assigned being that as the accused is charged with and may be found guilty of a capital offense under such an indictment, and as no punishment can be superadded to the death penalty, the only effect of such proof would be to prejudice the prisoner.

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The necessary effect of all statutes, which upon the trial of an offender admit proof of a former offense in order to heighten the punishment, is in some degree to prejudice the prisoner. It is in the very nature of such statutes and cannot be avoided; yet the legislature of this State, of our sister States and of Great Britain have seen proper, in the effort to prevent crime, to punish with greater severity one who has more than once offended against the law, or has become, in the language of some of the statutes, an habitual offender, than a person who is for the first time accused of crime.

So careful was the common law of admitting proof that might prejudice the prisoner, that it excluded evidence of the prisoner's character, unless he saw fit to put it in issue, and rigorously excluded all proof of former offenses; but, as we have seen, the legislatures of many States and of this Commonwealth have in their wisdom seen fit to abrogate this rule of the common law in certain classes of cases and admit proof of former offenses, where such offenses are alleged in the indictment, although the necessary and inevitable consequence is that to a greater or less degree it prejudices the prisoner. No one can doubt that upon a trial for grand larceny, which is punishable by confinement in the penitentiary, the allegation and proof of a former conviction of a like offense would influence the minds of the jury, and in a doubtful case might be a determining factor in reaching a verdict of guilty.

But with these considerations, I respectfully and earnestly submit, this court has no concern. We have nothing to do with them. Such questions are for the legislature. With abstract questions of justice and humanity, we, as judges, have no concern. We are here to administer the law as the legislature sees fit to enact it, and the only limitations upon its power with respect to the subject are such as the Constitution of the United States and of the Commonwealth impose. Among those limitations are that it can pass no *ex post facto* law; that it cannot put a man twice in jeopardy for the same offense; and that it

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can inflict no cruel or unusual punishment. Our inquiry, therefore, is confined to a correct interpretation of the statute, and whether or not it prejudices the prisoner is a question with which we have no concern.

The indictment in this case is in the usual form for murder of the first degree, to which is added the allegation that the accused, before the commission of the offense charged in the indictment, had been twice sentenced to confinement in the penitentiary in the State of Kentucky. Under this indictment, the prisoner could have been found guilty of murder of the first degree, which is punishable by death; of murder of the second degree, which is punishable by confinement in the penitentiary for not less than five, nor more than eighteen years; of manslaughter, punishable by confinement in the penitentiary for not less than one, nor more than five years; and of involuntary manslaughter. In addition, if the jury found him guilty of an offense punishable by confinement in the penitentiary, there could have been added, by virtue of section 3905. an additional sentence of five years' confinement in the penitentiary.

The section referred to is as follows: "When any person is convicted of an offense, and sentenced to confinement therefor in the penitentiary, and it is alleged in the indictment on which he is convicted, and admitted, or by the jury found, that he had been before sentenced in the United States to a like punishment, he shall be sentenced to be confined five years in addition to the time to which he is or would be otherwise sentenced."

And section 3906 of the Code, having the same purpose in view, provides that if it is alleged in the indictment and admitted, or so found by the jury, that the accused has twice before in the United States been convicted of an offense punishable by confinement in the penitentiary, he shall be sentenced to confinement in prison for life.

In this connection it may be remarked that the jury in their

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verdict do not, under sections 3905 and 3906, impose the added punishment. They only find the fact and the additional term is imposed by the court in obedience to the law. If the jury found him guilty of murder of the first degree, nothing of course could be added to that punishment; and so if he was found guilty of involuntary manslaughter, which is a misdemeanor, the penalty provided by section 3905 could not have applied.

All of the offenses enumerated are included in the indictment for murder of the first degree. The indictment is to be taken as virtually charging that the prisoner was guilty of murder of the first degree; that he was guilty of murder of the second degree; that he was guilty of manslaughter; and that he had been convicted before of an offense punishable by confinement in the penitentiary. All of these offenses, including the charges of the former offenses committed in Kentucky, are put in issue by the plea of not guilty, and evidence tending to prove any one of them is admissible as being relevant to the issue joined. If this were not so, then inasmuch as the prisoner was charged with a capital offense, no evidence except such as tended to prove a capital offense could be admitted. If no such proof could be admitted, no verdict other than murder of the first degree could properly be found, which would be in the teeth of the decisions of this court, of the law as stated by Bishop on Criminal Law, Vol. I, p. 705, and of section 4040 of the Code, and would be logically a *reductio ad absurdum*.

It is true that evidence as to the former convictions can have no relevancy with respect to murder of the first degree. It is not, indeed, substantive proof of any of the offenses included in the indictment. The fact that he was guilty of former crimes in Kentucky does not prove or tend to prove the specific crime of murder for which the prisoner was indicted, and evidence with respect to it is pertinent only to that allegation of the indictment which, if not admitted, must, in the language of the statute, be by the jury found. If the prisoner had been

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indicted, as he might have been, for murder of the second degree, or for manslaughter, and the indictment had contained the allegation with respect to the former offenses, there can be no doubt, I presume, that evidence with respect to them would have been free from all objection. In the indictment before us the offenses of murder of the second degree and of manslaughter are as completely comprehended as though the indictment had named those offenses, and had excluded the charge of murder of the first degree. When the evidence was offered it was for the court to determine whether or not it was relevant to any issue before the jury. The prisoner was upon trial for two offenses, the punishment for either of which would have been confinement in the penitentiary. He had by his plea put in issue the fact that he has committed the former offenses. If the jury found him guilty of murder of the second degree, or of manslaughter, and found also that he was guilty of the former offenses imputed to him, then all the conditions contemplated by the statute would have concurred, and there would have been no escape from the imposition of a sentence for the additional five years. How was the judge to know that the jury would find him guilty of murder of the first degree? If he was guilty of murder of the first degree and punished by death, of course the penalty for the former offenses alleged against him would go for nothing; and so, if he were found guilty of a misdemeanor, as he might have been. Under such circumstances there was nothing for the court to do but admit the evidence and leave its value to be determined by the conclusion at which the jury might arrive, as it was impossible for the court to see what verdict the jury would ultimately render.

But it is said its effect would be to prejudice the jury—to dispose them to render a verdict of guilty of murder of the first degree when they otherwise might have inflicted a lighter punishment. This is true. Such might have been its effect; and such, I repeat, not only may be, but is the natural effect of

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every charge of a former offense in an indictment, and of all proof of its commission. Judge Daniel, in *Rand's Case*, 9 Gratt. 738, refers to this, and properly makes it the cause of reversal; but it will be observed that it was error in that case and that case was reversed solely because the averment in the declaration did not comply with the statute law, and so far as that case is concerned it was controlled by the common law, which without doubt forbids proof, except in rare instances, of any crime other than that for which the accused is being tried.

The opinion of the court, in this connection, refers to a judgment of Judge Park, who was doubtless a very great judge but sometimes erred. It is in *Rex v. Jones*, in which he used the picturesque expression quoted by the court, that "if the jury were aware of the prisoner's conviction, it was like trying a man with a rope about his neck." It is this case which is referred to in 1 Bish. Crim. Law, at section 964, as follows: "Park, J., at first would not permit the jury to be informed of the prior conviction until it had passed upon the new charge, but this course the judges, at a meeting, deemed wrong. *Rex v. Jones*, 6 Car. & Payne 391. Then Parliament, by 14 and 15 Victoria, ch. 19, sec. 9, incorporated the former practice into the law. Since which time the prisoner is arraigned on the whole indictment in the usual manner; thereupon he pleads not guilty. The jury is first charged to inquire into the subsequent offense. Should the finding be guilty, it is next, without being sworn, to pass upon the other part of the indictment, and in each instance only the part of the indictment on which it is about to pass is read."

From that it would seem, and from the report of the case referred to it appears, that the judges, thirteen in number, disapproved of Baron Park's practice, and thereupon the matter was settled by act of Parliament and wise precautions taken to prevent prejudice to the prisoner. But our statute is an expression of the law as it stood in England before the act of Parlia-

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ment, and Baron Park's construction of it would have been rejected by the judges.

I submit, that if the legislature wishes to have a prisoner tried "with a rope around his neck," or in any other mode not repugnant to some constitutional restriction, it is a matter with which the courts have no concern.

It is to be regretted that this case, which I deem an important one, is to be considered under circumstances which render it impossible fully to consult the statutes and decisions of other States. So far as I have been able to examine them, however, the statutes of other States differ in material respects from our own.

From *Rand's Case*, *supra*, we gather, at p. 744, that the Massachusetts statute provided, that "where a person had been convicted of a crime punishable by confinement to hard labor, he should, upon conviction of another offense punishable in like manner, be sentenced to a punishment in addition to the one prescribed by the law for such last offense."

In Texas, as appears from the report in *Long v. State*, 36 Tex. 6, it is provided that "if it be shown upon the trial of a felony, less than capital, that the defendant has been before convicted of the same offense, or of one of the same nature, the punishment on such second or other subsequent conviction, shall be the highest which is affixed to the commission of such offense in ordinary cases." And by another section it is provided, that "a person convicted a second time of any offense to which the penalty of death is affixed as an alternative punishment, shall not receive on such second conviction a less punishment than imprisonment for life in the penitentiary."

But in our statute there is no such limitation as is found in Massachusetts which limits the introduction of evidence of a former offense to indictments where the prisoner is chargeable with an offense punishable by confinement at hard labor, which of course excludes capital punishment; and no such limitation as is found in the Texas statute, which in terms excludes the

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trial of capital cases. Our statute (section 3905) makes no reference to the charge for which the prisoner is being tried, nor to the character of the first offense, proof of which is authorized. It imposes no limitations and affixes no conditions, except that it must be alleged in the indictment on which the prisoner is convicted, and admitted or by the jury found that he had been sentenced, not for a like crime, but to a like punishment in the United States. The statute looks solely to the offense of which the accused is convicted; it has no reference to the offense with which he is charged; and this difference in phraseology between our statute and kindred statutes of other States could not have been the result of accident. It was a part of a well conceived and well considered scheme for the punishment of habitual offenders, which taken in connection with other sections *in pari materia* shows that the legislature was profoundly impressed with the policy of punishing with greater severity an habitual rather than an occasional offender, and took every precaution that no guilty man should escape. It might have been well to have thrown around the prisoner some of the safeguards that are introduced into the English statute before referred to; but the legislature has not seen fit to introduce them. It might have been well, had the prisoner so requested, to have postponed the introduction of the evidence of the former offense until a verdict had been reached upon the indictment on trial. This practice would have had the sanction of the high authority of Baron Park, but would have been in contravention of the judgment of the thirteen judges who were of a different opinion. Had it been done, however, it would at least have met with my approval. If the evidence was admissible for any purpose, the court was bound to admit it. *Cluverius v. Com'th*, 81 Va. 787. Had the prisoner desired to impose a limitation upon its effect, it was for him to request the court to make the restriction. It is of every-day occurrence that juries are told that they are not to consider evidence except subject to limitations which the court imposes. Evidence ad-



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missible for one purpose is improper for another. There is constantly occurring in the progress of trials incidents which tend to prejudice litigants in civil cases, or prisoner upon trial for a criminal offence. Courts sometimes admit evidence which is afterwards excluded; a judge will sometimes make a remark which will be prejudicial to the litigant or to the prisoner; counsel, in the heat of controversy, indulge in language which comes under the condemnation of the court. In all such cases all that can be done is to tell the jury that they must disregard the inadmissible evidence or the improper observation. It always remains possible that they are unable to efface it from their minds; that there still remains an unconscious impression which may insensibly influence their judgement; but that grows out of the infirmity of human nature. To say that every error committed during a trial, whatever effort may be made to correct it, should be ground for a new trial, would render the administration of justice impossible. Therefore, it is the constant practice of other courts and of this court to affirm verdicts and judgments rendered under conditions such as those to which I have alluded.

It is plain, however, from the authorities that the fact that the prisoner may be prejudiced by the introduction of the evidence of former conviction is not the test. If the evidence be relevant, it must be admitted. 1 Bish. Crim. Law, sec. 396, ch. 3.

In *Johnson v. People*, 55 N. Y. 512, Chief Justice Church said: "The objection that the evidence may affect the prisoner's character has no force when such evidence relates to the issue to be tried. Such evidence may be prejudicial to a prisoner as to the second offense, and a case might occur of a conviction upon too slight evidence, through the influence which a previous conviction of a similar offense might exert upon the minds of the jury; but there is no legal presumption that such a result will ever be produced. An English statute, passed in 1837, requires the principal charge to be first found by the jury, and

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then authorizes proof of the former conviction to be presented to them, but we have no such statute."

If our statute contained a provision similar to the English statute of 1837, referred to in *Johnson v. The People, supra*, then every objection urged in the opinion of the court to the admission of the evidence would vanish, and that without any change whatever in section 3905, except as to the order of proof. In such a case, if the jury found the prisoner guilty of a capital offense, the case would of course proceed no further, but if on an indictment for murder of the first degree he should be found guilty of one of the included felonies and of the former offense, then every requisite condition to the inflicting of the added penalty would exist. This would seem to show that only the fear of prejudicing the prisoner and not the terms of the statute leads to the exclusion of the evidence; but the authorities are conclusive that this reason is not sufficient if the terms of the statute do not require it. In other words, the proper interpretation of the language used in the statute can work no legal prejudice.

I am of opinion, therefore, that in this case, while the prisoner was charged with murder of the first degree, he was also charged with offenses punishable by confinement in the penitentiary; that when the evidence was offered it could not be foreseen at what verdict the jury would arrive; that the evidence of a former conviction was pertinent to be considered by the jury in ascertaining whether the prisoner had been convicted of the former offenses or charges, had they been of opinion that he was guilty of a less offense than murder of the first degree; that our statute differs materially from like statutes of other States to which we have access; that while it may prejudice the prisoner, such prejudice is inherent in the very nature of all such statutes; that while it might have been proper, had the prisoner so requested, that the judge should charge the jury not to consider the proof of the first offense as substantive proof of guilt of the offense for which he was being tried and that they should

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especially not allow it to influence them in determining whether or not the prisoner was guilty of murder of the first degree, there is no provision of the statute nor any rule of law which required the judge, of his own volition, to make any such statement to the jury; that the evidence being admissible, it does not in a legal sense prejudice the prisoner; and that there was no error in the ruling of the trial court in this respect.

The effect of the opinion of the court is to read into section 3905 an exception with respect to trials of all offenses in which capital punishment may be inflicted, the tendency of which is to afford the worst offenders an avenue of escape from the harsher punishment, which I think is in direct contravention of the policy of our law.

To answer this, the court in its opinion refers to section 4180 of the Code, which provides, that "when a person convicted of an offense, and sentenced to confinement therefor in the penitentiary, is received therein, if he was before sentenced to a like punishment, and the record of his conviction does not show that he has been sentenced under section thirty-nine hundred and five, or thirty-nine hundred and six, the superintendent of the penitentiary shall give information thereof, without delay, to the said Circuit Court of the city of Richmond, whether it be alleged or not in the indictment on which he was so convicted, that he had been before sentenced to a like punishment."

This section is treated by the court as supplementary of section 3905, and as intended to authorize the imposition of the added penalty where it has not been imposed by the trial court. This was doubtless the object of the section. It operates only upon such cases as might have been, but were not, punished under sections 3905 and 3906. I think it equally plain that it does not apply to any case which might not have been punished under those sections. And yet it is a matter of frequent occurrence that a man in prison upon a conviction for murder or manslaughter is brought before the circuit court under section 4180 and the additional punishment imposed upon him. Now

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in all those cases the man was indicted for murder of the first degree. He was convicted of a less offense, and sentenced to the penitentiary; and, having undergone a former conviction, he comes directly within the terms of section 3905 and section 4180; and it seems to me clear that if the added punishment can be imposed under section 4180 upon a man who was indicted for murder of the first degree, found guilty of a less offense and sentenced to the penitentiary, it necessarily follows that the added penalty could have been imposed at the trial under section 3905. The legislature, in furtherance of its policy to punish habitual offenders, was taking both chances. If the facts were known to the trial court, it was proper to indict and punish him in that court; but if for any reason that was not done, then jurisdiction was conferred upon the Circuit Court of the city of Richmond, at the instance of the superintendent of the penitentiary, to add the additional penalty. But while section 3905 must embrace every case which could come under the influence of section 4180, the converse is not true, and section 4180 does not embrace every case in which the trial court might, under section 3905, have imposed the additional penalty. The court, under section 4180, can only be put in motion by the superintendent of the penitentiary, while under section 3905 the attorney for the Commonwealth and the grand jury are charged with putting the machinery of the law in motion, and that opens the door to every possible avenue of information with respect to the former conviction.

The court being of opinion that the judgment should be reversed upon other grounds, does not deal with the motion to set aside the verdict as contrary to the evidence; but as I am of opinion that the judgment should be affirmed, my opinion must, of course, cover every assignment of error.

I shall not undertake to discuss the facts.

The law governing such cases is nowhere better stated than in *Bull v. Com'th*, 14 Gratt. 613: "The appellate court will not reverse the judgment, unless by rejecting all the parol

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evidence for the exceptor and giving full faith and credit to that of the adverse party the decision of the court below still appears to be wrong."

Since that decision was pronounced, section 3484 of the Code has been enacted, which declares that if any case at law, civil or criminal, is tried by a jury and a party excepts to the decision on the ground that it is contrary to the evidence, and the evidence is certified, the rule of decision in the appellate court, in considering the evidence, shall be as on a demurrer to the evidence by the appellant.

Now, whether the evidence in this case be considered under the statute, or under the law as it existed before the statute, it is ample to sustain the verdict. The jury were carefully and correctly instructed; and, upon the whole case, I am of opinion that the judgment should be affirmed.

*Reversed.*

CARDWELL, J., concurs with KEITH, P.

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## ACKNOWLEDGMENTS.

1. *Married Women—Substantial Compliance With Statute.*—A substantial compliance with the statute as to taking and certifying a married woman's acknowledgment to a deed, under the former statute on the subject, was all that was required. A literal compliance was not necessary. *Geil v. Geil*, 101 Va. 773, is affirmed. *Saffell v. Orr*, 768.

ACTIONS. See COSTS, 1.

ADMISSIONS. See EVIDENCE, 1; WITNESSES, 4, 8.

AFFIDAVIT. See CARRIERS, 15.

AFRICANS. See COVENANTS.

AMENDMENTS. See EXECUTIONS, 2; EQUITY, 3, 4.

## APPEAL AND ERROR.

1. *Appeal from County Court to Circuit Court—Review—Jurisdiction.*—On a writ of error from this court to a circuit court, this court has jurisdiction to review the action of the circuit court and to determine whether or not it had jurisdiction of a writ of error from that court to the county court, and, if it had not, to reverse its judgment and enter such judgment as the circuit court ought to have entered. It is not assignable as error, therefore, in this court that the writ of error from the circuit court to the county court was not perfected within the time prescribed by law. *Louisa County v. Yancey*, 229.
2. *Assignment of Error—What Not Sufficient.*—A statement in a petition for a writ of error that "without discussing in detail the instructions asked for and refused by the court, it is submitted that they expressed correctly the several propositions stated in them, and that there was evidence supporting or tending to support them," is not a sufficient assignment of error, either under section 3464 of the Code, or Rule II of this court. A petition for a writ of error is in the nature of a

pleading, and must state clearly and distinctly the errors relied on to reverse the judgment. *Washington So. Ry. v. Cheshire*, 741.

3. *Decree of Appellate Court—Finality—Res-Judicata—What is Concluded—Ex Parte Settlements—Surcharge and Falsification.*—When the *ex parte* settlements of a trustee have been surcharged and falsified by a bill filed for that purpose, and the decree of the trial court has been affirmed by this court with respect to all items of surcharge and falsification, it is a finality not only with respect to the particular items to which the attention of the court was called, but with respect to all the accounts which the trustee had settled before the institution of the suit. New items existing when the former decree was made cannot, as a rule, be added by the trial court when the case is remanded. The former adjudication applies not only to matters actually then adjudicated, but to every point which properly belonged to the subject of litigation, or which the parties, exercising reasonable diligence, might have brought forward at the time. *Miller v. Smith*, 651.
4. *Constitutional Question—Limit of Jurisdiction.*—The constitutional question upon which the jurisdiction of this court solely depends not being sustained, this court is without jurisdiction to pass on the merits of the case. *Adams Ex. Co. v. Charlottesville W. Mills*, 1.
5. *Correcting Excessive Judgment.*—The judgment of a trial court will not be abated by this court as excessive, unless the record clearly establishes such excess. *Columbia A. Co. v. Pine Beach Corp'n*, 325.
6. *Errors of Calculation—Correction.*—A manifest or admitted error in the amount of a judgment at law will be corrected by this court, without remanding the cause for such correction. *Richmond v. Barry*, 274.
7. *Executors and Administrators—Ex Parte Settlements of Fiduciary Accounts—Ruling on Exceptions.*—No appeal lies to this court from an order of an inferior court merely overruling exceptions and confirming a commissioner's report of an *ex parte* settlement of an executor's account. The remedy is by a bill to surcharge and falsify the *ex parte* settlement. Until surcharged and falsified it is to be taken as *prima facie* correct, and an order of this court affirming the order of the inferior court would not make it any more final than it was before the appeal was taken. *Owens v. Owens*, 432.
8. *Harmless Error.*—This court will not reverse a case for the exclusion of evidence by the trial court which could not have affected the result. *Lynchburg Milling Co. v. Bank*, 639.

9. *Instructions—Invited Error.*—Although an instruction requested by a defendant was not given by the trial court, yet if it did instruct upon that point as requested by the defendant, he cannot complain, on a writ of error, of the ruling of the trial court on that point. If error was committed, it was invited by him. *Louisa County v. Yancey*, 229.
10. *Instructions—Objections Not Assigned.*—This court will not consider objections to instructions given by the trial court when neither the petition for the writ of error nor the brief of counsel point out in what respect the instructions are erroneous. *Columbia A. Co. v. Pine Beach Corp'n*, 325.
11. *Instructions—Not Prejudicial—Case at Bar.*—Where the only difference between an instruction given and an amendment proposed by the defendant consists in the fact that, in the instruction given the duty was imposed upon the defendant of raising an awning if the wind was "dangerously high," and in the amendment the same duty was imposed if the wind was "high," the instruction given was not prejudicial to the defendant, and he cannot complain of it. *McCrorey v. Thomas*, 373.
12. *Joint Tort Feasors—Contribution—Effect of Dismissal as to One.*—While joint tort feasors are jointly and severally liable, no right of contribution exists among them, and neither has a remedy over against the other. If they are proceeded against jointly, the plaintiff may dismiss or discontinue his action as to one defendant, without affecting his rights against the other. If judgment is against one, the other cannot have a writ of error to review it. *Walton, Witten & Graham v. Miller*, 210.
13. *Mandamus—Adequate Remedy.*—The pendency of a writ of error to the ruling of a circuit court dismissing the appeal of a railroad company from the refusal of the board of supervisors of a county to act upon its petition asking the board's consent to a proposed alteration of a county road, is no bar to the prosecution of a writ of error to the ruling of said circuit court refusing to award to said railroad company a mandamus to compel the board to take action on said petition. The writ of error in the first case is neither an adequate nor a proper remedy. *C. C. & O. R. Co. v. Scott County*, 34.
14. *Objection to Competency of Evidence.*—A party cannot object to the competency of evidence for the first time in the appellate court. *City of Richmond v. Wood*, 75.
15. *Objections to Evidence—Changing Objection—Harmless Error.*—A party will not be permitted to make one objection to evidence in the trial court and another in the appellate court, nor will a case be reversed for the admission of evidence that



could not have prejudiced the objector. *McCrorey v. Thomas*, 373.

16. *Objections to Evidence—Waiver.*—Objections to evidence will not be considered in this court, when the same facts were proved by another witness, without objection. *New York, &c. R. Co. v. Wilson*, 754.
17. *Perfecting Appeal—Time Deducted—Objections for First Time in Appellate Court.*—Whether a writ of error from a circuit court to a county court was perfected within the time prescribed by law depends, among other things, upon the time which had elapsed between the presentation of the petition for the writ and the delivery of the record and petition to the clerk of the appellate court, which time is to be deducted. If the case was argued in the circuit court, made a vacation case by consent, and submitted to the court for decision, without making the objection that the writ of error was not perfected within the time prescribed by law, and the record is silent as to the time to be deducted as above mentioned, the objection that the writ of error from the circuit court to the county court was not perfected in due time cannot be raised for the first time in this court. *Louisa County v. Yancey*, 229.
18. *Trial on Amended Declaration—Defects in Original.*—Where it is apparent that a case was tried on an amended declaration to which there was no demurrer and which stated a good cause of action, questions raised by a demurrer to the original declaration will not be considered in this court. *Washington So. Ry. v. Cheshire*, 741.
19. *Excessive Verdict.*—A verdict will not be set aside as excessive in an action to recover damages for personal injuries when it is not so large as to indicate that the jury was actuated by partiality or prejudice. *McCrorey v. Thomas*, 373.
20. *Verdicts—Conflicting Testimony—New Trial in Trial Court—Demurrer to Evidence.*—The verdict of a jury is entitled to great respect and should not be set aside, even by the trial court, unless plainly against the weight of the evidence. The jury are the judges of the credibility of the witnesses, and where there is serious conflict of evidence on a material point, the judgment of the trial court setting aside the verdict will be reversed by this court on writ of error, and final judgment entered upon the verdict. To warrant a new trial where the evidence is conflicting, the evidence must be insufficient to sustain the finding of the jury. In considering such a case on a writ of error, it is not heard as upon a demurrer to the evidence. *Thompson v. Norfolk & P. Co.*, 733.
21. *Verdict Supported by Evidence.*—The evidence in the case at bar, viewed as upon a demurrer to the evidence, fully sustains

the verdict of the jury which was approved by the trial court, and the verdict cannot be disturbed on appeal. *Walton, Witten & Graham v. Miller*, 210.

22. *Verdicts—Credibility of Witness—Jury Sole Judges—Appeal and Error—Case at Bar.*—The jury are the sole and final judges of the credibility of witnesses. So long as a witness testifies to facts which, if true, are sufficient to maintain the verdict, the fact that his credit is impeached by an attack upon his character, or by contradictory statements—especially conflicting statements made out of court—affects only his credibility, and goes to the weight and sufficiency of his testimony, not to his competency. If the jury, in their discretion, see fit to base their verdict upon his testimony, and the trial court refuses to disturb that verdict, there can be no relief in an appellate court. In the case at bar, the verdict in the main rests upon the testimony of a witness who shifted his position without hesitation, whose statements as a witness were contradicted by his letters written during the progress of negotiations concerning the policy of insurance which is the subject of litigation, and who was seriously discredited throughout the trial, and yet the jury have seen fit to credit him, and the trial judge has approved their verdict. Under such circumstances, the verdict cannot be disturbed in this court. *Equitable Life Ass. Soc. v. Kitts*, 105.
23. *Weight of Verdict in Appellate Court.*—Where the evidence is conflicting this court cannot set aside a verdict rendered thereon if there is sufficient evidence to support the verdict, although the court may be of opinion that the preponderance of the evidence is against it. *Norfolk & P. Co. v. O'Neill*, 670.
24. *Weight Given to Verdicts—Verdict Contrary to Law.*—The jury are the triers of the facts, and also determine the credibility of the witnesses and the weight to be given to their testimony, and their findings of facts are entitled to great respect, especially when approved by the trial judge, but when the facts as found by the jury do not warrant their verdict, and the verdict is plainly against the law, it will be set aside on a writ of error from this court, and a new trial awarded. *Portsmouth v. Houseman*, 554.

See **BILLS OF EXCEPTION**, 1, 2, 3; **CRIMINAL LAW**, 2, 26, 28; **EVIDENCE**, 1; **INSTRUCTIONS**, 10; **PLEADING**, 13; **VERDICTS**, 1, 3.

**ARCHITECTS.** See **CONTRACTS**, 1.

**ARGUMENT.** See **INSTRUCTIONS**, 9.

ASSAULT AND BATTERY. See CARRIERS, 1.

ASSESSMENTS. See TAXATION, 1, 2.

ASSIGNMENTS.

1. *Assignees—Action in Name of.*—The assignee or beneficial owner of a contract may, under the express provisions of section 2860 of the Code, maintain an action thereon in his own name. *Portsmouth Refining Co. v. Oliver R. Co.*, 513.

See CORPORATIONS, 1.

ASSUMPSIT. See PLEADING, 1, 11, 14.

ASSUMPTION OF RISK. See MASTER AND SERVANT, 10.

ATTACHMENTS.

1. *Claim for Damages for Breach of Contract—Defendant Removing Effects Out of State—Jurisdiction of Justice.*—A justice of the peace has jurisdiction under the provisions of sections 2960 and 2961 of the Code to issue an attachment, on a claim for damages for breach of contract, against a defendant who intends to remove his effects out of the State. The liability for damages for a breach of contract is a debt contracted, not a tort. The statute uses the word "claim," which is as broad a term as could well have been used, and where the complaint, the affidavit and the attachment conform to the statute it cannot be said that the attachment is invalid on its face, or that the justice was without jurisdiction. *Myers v. McCormick*, 160.

BANKRUPTCY. See EXECUTORS AND ADMINISTRATORS, 2.

BANKS AND BANKING.

1. *Money Paid by Mistake.*—Generally, money paid under a mistake of fact may be recovered back, but the payment of a check or note by a bank upon which it is drawn, or at which it is made payable, under the mistaken belief that the drawer of the check or the maker of the note has sufficient funds to his credit to pay the check or note seems to be an exception to the general rule. Such payments cannot be recovered back. The payment is a finality, and the fact that the drawer or maker had no funds on deposit does not alter the situation. *Citizens Bank v. Schwartzschild*, 539.
2. *Coupons Payable at Bank—Payment by Mistake.*—If negotiable coupons payable to bearer and possessing all the qualities and

incidents of commercial paper are paid by mistake by the bank at which they are payable, there can be no recovery by the bank against the former holder of such coupons as for money paid by mistake. *Citizens Bank v. Schwartzschild*, 539.

3. *Pass-Books—False Entries—Negligence of Depositor—Case at Bar—Estoppel—Question for Jury.*—The evidence in the case at bar makes out a case peculiarly for the determination of a jury under proper instructions from the court, and it was error for the trial court to have sustained the demurrer to the evidence tendered by the defendant. The plaintiff had been a depositor in the bank for many years and relied upon the bank to keep his account correctly, but, for three years, one or more of the employees of the bank had been engaged in systematically defrauding him, and had successfully concealed their frauds by making and rendering to him false accounts. Whether or not he was estopped to deny the correctness of the accounts as rendered by the bank from time to time should, under the circumstances, have been left to the jury. *Brown v. Lynchburg Nat'l Bank*, 530.

4. *Pass-Books and Vouchers—Duty of Depositor—Duty of Bank.*—It is the duty of a bank depositor to examine within a reasonable time and with ordinary care the account rendered in his pass-book, and the vouchers returned by the bank to him, and to report any errors discovered without unreasonable delay. The examination need not be so minute as to exclude any possibility of error, but it should be made in good faith and with ordinary diligence, and such care should be used as the circumstances of the particular case required. It is likewise the duty of the bank to keep careful and faithful accounts with its depositors, to scrutinize checks, and to exercise proper care and skill to prevent or to discover fraud. *Brown v. Lynchburg Nat'l Bank*, 530.

See NEGOTIABLE INSTRUMENTS, 1.

BAYLOR SURVEY. See OYSTERS, 2.

#### BILL OF EXCEPTION.

1. *Incorporation of Evidence—Identification of Evidence.*—A bill of exception which, after certifying that the plaintiff and defendant each introduced evidence, says "all of which evidence, both for the plaintiff and the defendant, is found in a typewritten booklet now marked 'A,' and is adopted by the court as the evidence introduced by the plaintiff and the defendant," and that it contains all the evidence offered by them, sufficiently identifies the evidence and makes it a part of the record of the case. *Norfolk & W. R. Co. v. Rhodes*, 176.

2. *Signature of Judge—Part of Record.*—Where a bill of exception, certifying the evidence, is signed and sealed by the presiding judge at the end of the formal part of the bill, and immediately following it there is a statement of "all the facts proven on the trial of this case," which is likewise signed and sealed by the judge, and it unmistakably appears that both were made up and signed by the judge at the same time, in open court, this is a sufficient incorporation of such facts into the record. *Savage v. Cauthorn*, 694.
3. *Unsigned Bill.*—The evidence given on the trial of an action at law is no part of the record unless made so by a proper bill of exception, and a bill not signed by the judge who presided at the trial is not properly authenticated and hence is not a bill of exception. *Colby v. Reams*, 308.

BILL OF LADING. See CARRIERS, 14.

#### BILL OF PARTICULARS.

1. *Picading—Declaration—Bill of Particulars—Code, Section 3249.*—The object of section 3249 of the Code is to simplify and shorten pleadings, by providing that, if the declaration or other pleading do not present distinctly the grounds or subject of action, the plaintiff, if required to do so, should file such a statement of particulars as will put the defendant in possession of the character thereof. *City of Richmond v. Wood*, 75.

See DAMAGES, 3; PLEADING, 2.

BILLS AND NOTES. See NEGOTIABLE INSTRUMENTS, 1.

BLASTING. See RAILROADS, 4.

BONDS. See ELECTIONS, 2, 3; EXECUTORS AND ADMINISTRATORS, 2, 3; INJUNCTIONS, 1, 3, 4.

#### BOUNDARIES.

1. *Descriptions—Party Walls—Courses and Distances—Monuments—Case at Bar.*—While courses and distances yield to monuments where there is a conflict, the evidence must show a conflict, and, in the absence of evidence, the presumption is that no such conflict exists. In the case at bar, it is held that, upon a proper construction of the conveyances, the true dividing line between the properties in controversy is the center line of the party wall between said properties, and that to the extent, if any, that the defendant's structures extend beyond the dividing line and upon the premises of the plaintiff the latter is entitled to recover, and that the jury should have been so instructed. *Hatcher v. Richmond & C. B. Ry. Co.*, 357.

**CARRIERS.**

1. *Assault on Passenger by Trainmen—Abusive Language—Respective Rights of Carrier and Passenger.*—It is the duty of those in charge of a passenger train to preserve order and to remove disorderly persons to such safe and convenient place as will prevent annoyance to passengers and trainmen, and it may be to stop the train and eject disorderly persons therefrom, employing only such force as is necessary to accomplish these ends, and overcome any resistance offered; but they have no right to commit any unnecessary violence, and if they do their principal must answer in damages. Insulting words and epithets cannot justify an assault upon a passenger by those in charge of the train, though they may be given in evidence in mitigation of damages. Those in charge of a train have the right to protect themselves against an injury, actual or threatened, and if in so doing, an injury is inflicted upon the passenger under such circumstances that he could not recover damages against the company's servant, neither can he recover against the company. But the evidence must at least show a present injury reasonably to be apprehended, in order that the company may escape liability for an assault and battery upon a passenger by one of those in charge of the train, however abusive may have been the language or reprehensible the conduct of the passenger. *Norfolk & W. R. Co. v. Brame*, 422.
2. *Express Companies—Are Transportation Companies—Code (1904), Section 129½c (24).*—An express company is declared to be a transportation company by the statute law of this State and is, therefore, expressly included in the terms of section 129½c (24) of Code (1904). *Southern Express Co. v. Keeler*, 459.
3. *Fraudulent Concealment of Value By Owner—Case at Bar.*—The facts of the case at bar do not warrant the contention of the express company that the shipper obtained a cheaper rate for her trunk by a fraudulent concealment of its true value. The agent of the company received the trunk from the shipper and removed it from an upper to a lower floor promising to return later and remove it, without making any inquiry as to its value or imparting any information as to rates. The company was afterwards three times requested over the 'phone to call for the trunk, but neglected to do so; and it was finally sent to the express office by a negro driver. When asked the value of the trunk, the driver truthfully answered that he did not know. The company issued and delivered to the driver a bill of lading which he delivered to the shipper, with the customary stamp, "value asked and not given."

*Held*: Fraudulent concealment cannot be predicated of such a state of facts. *Southern Express Co. v. Keeler*, 459.

4. *Initial Carrier—Acts on Its Own Line—Liable as at Common Law.*—The liability of an initial carrier of goods under section 1294c (24) of the Code of 1904, with respect to acts done on its own line, remains as at common law, and is that of an insurer. *Ches. & O. R. Co. v. Pew*, 288.
5. *Interstate Shipments—Loss of Goods—Liability of Initial Carrier—Warehousemen.*—The Act of Congress of June 29, 1906, makes the initial carrier of goods, who issues a through bill of lading on interstate shipments, liable for losses occurring on connecting lines, any "contract, receipt, rule or regulation" to the contrary notwithstanding. If the constitutionality of this act be conceded, still the acts of the connecting carrier for which the initial carrier is made liable are acts as carrier, and not as warehouseman. If the goods have reached their destination, and the consignee, after ample notice, has failed and neglected to receive them for an unreasonable time, the liability of the connecting carrier ceases, and it becomes a mere warehouseman, and for its acts or negligence as warehouseman the initial carrier is not liable. *Norfolk & W. R. Co. v. Stuart Draft Co.*, 184.
6. *Injury to Passenger—Presumption of Negligence.*—Where an injury to a passenger is caused by the derailing of a train, by a collision or by other accident to the car in which the passenger is riding, the happening of the accident is *prima facie* evidence of negligence on the part of the carrier, and if the passenger is free from negligence, the burden is on the carrier to show that it performed its whole duty, and that the injury was unavoidable by the exercise of human care and foresight. *Norfolk & W. R. Co. v. Rhodes*, 176.
7. *Injury to Passenger—Negligence—Sufficiency of Declaration.*—In an action by a passenger against a carrier for a personal injury, a declaration which simply charges in different counts that the defendant was negligent in the operation of its train, that it did not have a proper road-bed or track, and that its locomotive, cars and coaches were defective, is not sufficient, but if, in addition, there are charged in each count such facts and circumstances attending the injury, as shown that the movement of the train was so unusual and extraordinary as to break the plaintiff loose from his hold on the water-closet, and that the accident could not well have happened without negligence on the part of the carrier, the declaration is sufficient, as a *prima facie* presumption is raised of negligence on the part of the carrier. *Norfolk & W. R. Co. v. Rhodes*, 176.

8. *Injury to Passenger—Lurching of Train—Negligence—Presumption—Accident.*—In the absence of any evidence, direct or indirect, of negligence on the part of a carrier in the selection or retention of its servants, or in respect to its appliances or road-bed, and where there is no evidence of excessive speed except the opinion of witnesses who testify to no facts which show extraordinary or unusual speed, it will not be presumed that the carrier was negligent; and the fact that a passenger, walking along the aisle of a coach, is thrown to the floor by the lurching of the train while passing rapidly over a curve in the road must be deemed to be an accident for which no one is responsible. The danger of such an accident is one of the risks which the passenger assumes. While a carrier of passengers is liable for injuries resulting from the slightest negligence on its part, it is not an insurer of the safety of its passengers. *Norfolk & W. R. Co. v. Rhodes*, 176.
9. *Injury to Passengers—Proximate Cause—Leaving Elevator Door Open—Operation by Stranger.*—Leaving an elevator door open while the "elevator boy" is temporarily absent in another part of the building is not the proximate cause of an injury inflicted on a passenger by the negligence of a stranger who undertakes to operate the elevator, nor was such an injury reasonably to have been anticipated by the owners of the elevator. *Board of Trade Co. v. Cralle*, 246.
10. *Injury to Goods in Transit—Connecting Carriers—Liability of Initial Carrier—Burden of Proof—Code, Section 1294l.*—Where goods shipped on a through bill of lading to a point beyond the line of the initial carrier arrive at destination in an injured condition and the initial carrier is sued for the injury, the burden is upon him to show that the property was not injured on his line. Section 1294l of the Code (1904) declares that whenever property is received by a common carrier, loss or injury to it shall be *prima facie* evidence of the negligence of such carrier. *So. Express Co. v. Jacobs*, 27.
11. *Injury to Goods in Transit—Place of Assessment—Measure—Connecting Carriers.*—Generally, the place of destination is to be taken as the basis for determining the damages to goods injured in transit; the measure being the difference between what the goods were worth at the place of destination, as injured, and what they would have been worth if delivered in good order. And this rule referring the measure of damages to the place of destination is applicable where goods are taken for transportation to a point beyond the initial carrier's line. *So. Express Co. v. Jacobs*, 27.
12. *Liabilities for Goods—Insurer—Restricting Liability—Code (1904), Sec. 1294c (24).*—Under section 1294c (24) of the



Code of 1904, the liability of a common carrier of goods with respect to goods lost on its own line is that of an insurer except against losses occasioned by the act of God, or a public enemy, or of the shipper, or the nature or inherent qualities of the goods shipped, and a contract with a common carrier whereby, in consideration of a reduced rate, a shipper agrees to accept an agreed sum, less than the true value of goods lost, is invalid. *Ches. & O. R. Co. v. Pew*, 288.

13. *Limiting Liability—Code (1904), Section 1294c (24).*—While at common law, a common carrier could not contract against his own negligence, he could qualify his liability as *quasi insurer* by special acceptance upon such reasonable terms and conditions as might be agreed upon with the shipper, provided they were not incompatible with his duty to the public. But it was the manifest purpose of the legislature, by the enactment of section 1294c (24) of the Code of 1904, to deprive the common carrier of the right to thus limit his liability, and to relegate him to his common law rights and responsibilities independent of contract. *Southern Express Co. v. Keeler*, 459.
14. *Loss of Goods—Presentation of Claim—Time Limit.*—The provision of a bill of lading that claims for loss or damage must be made in writing to the agent of the carrier at the point of delivery promptly after arrival, and fixing a limitation of thirty days after delivery, or after due time for delivery, within which such claim shall be presented, is a reasonable one, and, unless waived, is enforceable by the carrier in bar of any action by the shipper for such loss or damage. *Atlantic Coast Line v. Bryan*, 523.
15. *Lost Goods—Failure to Present Claim in Time—Vested Right of Defense—Subsequent Attempt to Find Goods—Waiver—Case at Bar.*—An attempt by a carrier to find a lost shipment after its exemption from liability has attached and become a vested right by reason of the failure of the shipper to present a claim therefor within the time and at the place stipulated for in the bill of lading, does not constitute a waiver of its right to claim such exemption, if the goods should not be located. A waiver, to be available, must be made with full knowledge of the rights intended to be waived, and the intention to waive them must be made to appear plainly. In the case at bar it is held that a letter from the carrier's agent, after exemption from liability had attached, requesting "the affidavit of the packer of the case, also invoice showing the original cost of the articles," and stating that promptly upon the receipt of these documents the matter will receive attention, did not constitute a waiver of the carrier's exemption from liability, nor estop it from relying on its exemption as a defense. *Atlantic Coast Line v. Bryan*, 523.

16. *Restricting Liability*—Code, Sec. 129½c (24)—*Insurers*.—Under section 129½c (24) of the Code of 1904, contracts exempting common carriers from their common law liability, either with respect to the amount or degree of their liability as insurers, are invalid. *Ches. & O. R. Co. v. Pew*, 288.

See CONSTITUTIONAL LAW, 3; EVIDENCE, 2, 3, 9.

CHARITIES. See MUNICIPAL CORPORATIONS, 1.

CLAIM. See ATTACHMENTS.

COCAINE. See CRIMINAL LAW, 26.

COLLATERAL ATTACK. See EMINENT DOMAIN, 2, 5; TAXATION, 3.

COLORED PERSONS. See COVENANTS.

COMMISSIONER IN CHANCERY. See CRIMINAL LAW, 3; EQUITY, 1.

COMMISSIONER'S REPORT. See APPEAL AND ERROR, 7; EQUITY, 6.

CONCEALED WEAPONS. See CRIMINAL LAW, 3, 4; STATUTES, 5.

CONDITIONAL SALES. See FIXTURES, 2; SALES, 2, 3, 4.

CONDITIONS. See CONTRACTS, 2; DEEDS, 2, 3, 4; RAILROADS, 3.

CONFLICT OF LAWS.

1. *Corporations—Foreign Corporations—Stockholder—Liability for Debts of Corporation—Foreign Law*.—The liability of a stockholder in a foreign corporation for the debts of such corporation is to be determined by the laws of the State of incorporation. *Mountain Lake Co. v. Blair*, 147.
2. *Laws of Sister State—Presumption*.—In the absence of proof as to the laws of a sister State of the Union, having the common law as the basis of its system, it will be presumed that the common law prevails there, and the rights of the parties will be determined upon common law principles. The courts of this State will not take judicial notice of the laws of a sister State at variance with the common law, but, upon common law questions, will presume that the common law of a sister State is similar to that of their own. *Mountain Lake Co. v. Blair*, 147.

CONSIDERATION. See VENDOR AND PURCHASER, 6.

## CONSTITUTIONAL LAW.

1. *Due Process*.—"Due process of law" requires that a person shall have reasonable notice, and an opportunity to be heard before an impartial tribunal before any binding decree or order can be made affecting his right to liberty or property. In the case in judgment these requirements have been fully complied with. *Commission v. Hampton Roads Oyster Co.*, 565.
2. *Equal Protection of the Laws*—*Protection of Railroad Employees*.—Section 162 of the Constitution of this State, and the statute putting it into operation, for the better protection of employees of railroad companies, extend to all railroads alike, and do not violate the provision of the Fourteenth Amendment of the Constitution of the United States forbidding any State to deny to any person within its jurisdiction the equal protection of the laws. The State has the right to make reasonable classifications of legislation, and the hazardous character of the business of operating railroads renders it reasonable to enact laws for the better protection of their employees. *Ches. & O. R. Co. v. Hoffman*, 44.
3. *Interstate Commerce Act*—*Reduction of Rates by False Billing*—*Virginia Act Constitutional*—*Code 1904, Sec. 1294c*.—Clause ten of section 1294c of Code of 1904 regulating common carriers is modeled after the Interstate Commerce Act, and is practically identical with its provision on the same subject, except that the penalty for its violation is less drastic. Each forbids, under penalty, false billing, weighing, classifying, and the like, of goods offered for shipment, and thereby obtaining transportation at less than the regular rates. The Virginia statute, therefore, is not unconstitutional, because in conflict with the Federal act. *Adams Ex. Co. v. Charlottesville W. Mills*, 1.
4. *Legislative Powers of General Assembly*.—As to matters not ceded to the Federal Government, the legislative powers of the General Assembly are without limit, except so far as restrictions are imposed by the Constitution of the State in express terms or by strong implication. The State Constitution is a restraining instrument only, and every presumption is made in favor of a State statute. *Willis v. Kalmbach*, 475.
5. *Office of Schedule*.—The office of a schedule to a Constitution, as a general rule, is to provide for a transition from the old to the new government, and to obviate inconveniences which would otherwise arise from such transition, and not to introduce independent and substantive provisions of law into the Constitution, though the latter may be done if the purpose to do so plainly appears. *Willis v. Kalmbach*, 475.
6. *Sinking Fund for County Bonds*—*Section 187 of Constitution Applicable to State Only*.—Section 187 of the Constitution of

this State providing that "every law hereafter enacted by the General Assembly creating a debt or authorizing a loan shall provide for the creation and maintenance of a sinking fund for the payment and redemption of the same" refers only to a debt contracted by, or a loan made to, the State, and not to bonds issued by a county for the purpose of erecting a courthouse. Moreover, section 834d of the Code of 1904 enacted prior to the act called in question to this controversy, and *in pari materia*, authorizing the boards of supervisors of the several counties, under certain conditions, to borrow money and issue bonds therefor whenever necessary to build a courthouse, provides that when the bonds of a county are so issued, the board of supervisors shall levy a tax sufficient to pay the interest thereon and create a sinking fund to pay the principal at or before maturity. *Conk v. Skeen*, 6.

7. *Statutes—Validity—Construction.*—While the courts have the power, and in a proper case it is their duty, to declare a statute unconstitutional, it is a duty of the utmost delicacy. Every presumption is to be made in favor of the constitutionality of a statute, and it can never be declared unconstitutional except where it is *clearly* and plainly so. To doubt is to affirm constitutionality. There is no such thing as a doubtful constitutional statute. *Willis v. Kalmbach*, 475.
8. *Validity of Statutes—Doubtful Acts.*—Courts can only declare an act of the General Assembly unconstitutional when such clearly and plainly violates the Constitution in such a manner as to leave no doubt or hesitation in the minds of the court. *Commonwealth v. School Board*, 346.
9. *Statutes Susceptible of Two Constructions.*—Every statute is presumed to be constitutional, and cannot be declared to be otherwise unless it is made clearly so to appear. If a statute is susceptible of two constructions, one of which is plainly within, and the other plainly without, the legislative power, the courts must adopt the former. *Adams Ex. Co. v. Charlottesville W. Mills*, 1.
10. *Taxation Without Right to Vote—Permanent Roads—County Bonds—Acts 1906, p. 105.*—The act of March 8, 1906, "to provide for issuing county bonds for permanent road improvement in the magisterial districts of the counties of the State," denies to voters residing within a town which is exempt from road-tax the right to vote at elections held under the act. The act further provides that "a tax shall be levied on all property liable to State tax in such magisterial district." *Quære*: Are these features of the act repugnant to section 6 of the Constitution so far as it affects citizens of a town which lies within a magisterial district, and is exempt from road-tax? *Eggborn v. Culpeper Co.*, 94.

See APPEAL AND ERROR, 4; CARRIERS, 5; CORPORATIONS, 7; CRIMINAL LAW, 23; ELECTIONS, 1, 4, 5, 6; EMINENT DOMAIN, 1, 8; INTOXICATING LIQUORS, 2; LOCAL OPTION, 1; MASTER AND SERVANT, 9; MUNICIPAL CORPORATIONS, 1; SCHOOLS, 1; STATUTES, 2, 3, 4; TAXATION, 2.

CONTINUANCE. See EVIDENCE, 11.

#### CONTRACTS.

1. *Building Contracts—Damages for Breach—Architect's Certificate—Condition Precedent—Cross Bill.*—Where a contract for building materials requires the certification by the architects of the refusal, neglect or failure of the contractor to furnish materials, and that any damage resulting from such default shall be audited and certified by the architects, whose certificate shall be conclusive upon the parties, there can be no recovery of such damages unless such certificate is produced, or good reason is shown why it is not. Obtaining the certificate is a condition precedent to the institution or maintenance of legal proceedings to recover damages for the breach of the contract. The same rule applies to the assertion of such a claim by a cross-bill filed in a suit to enforce a mechanics' lien, for materials furnished. *Belmont Iron Works v. Hotel Corporation*, 269.
2. *Conditions Precedent—Performance.*—A plaintiff will not be required to perform his contract if it is not a condition precedent before he can call on the defendant to perform his, which alone can secure the plaintiff in the rights he acquired under the contract. *Tidewater Railway Co. v. Hurt*, 204.
3. *Construction.*—Under a contract providing that a contractor shall furnish all materials of every description, and shall shore all trenches with sheet piles and braces to prevent any settlement, and that when necessary sheet piles and braces shall be left in the trenches to prevent settlement, lumber and timber left in a sewer at the request of the city engineer constitute materials which, according to the contract, the contractor had to furnish and leave in the trenches. *Richmond v. Barry*, 274.
4. *Construction—Ambiguity—Usage of Trade—Estimating Brick Wall.*—Where a contract for a brick sewer provides that the "price for bricks furnished and laid in the sewer shall be twenty dollars and fifty cents per M," in the absence of any local usage or custom which should control in ascertaining the number of bricks laid in the sewer, or of any special agreement, the parties are deemed to have contracted with reference to the general usage of trade, or universal custom relating to such matter: and, according to such trade usage or custom,

the number of bricks is to be ascertained by measurement and allowing so many bricks to the cubic foot, and not by actual count. This trade usage or custom is read into the contract by operation of law, and becomes as much a part of the contract as if incorporated into it. *Richmond v. Barry*, 274.

5. *Construction—Terms of Contract—Question for Jury—Instructions.*—While the construction of the contract, in the case at bar, was for the court, still the question as to what was the contract or agreement of the parties as to the liability or non-liability of the defendant, who was the promoter of a corporation, was a question of fact for the jury; and, in determining that question, they should have been instructed to take into consideration all of the evidence, oral and written, bearing upon that issue. *Strause v. Richmond, &c. Co.*, 724.
6. *Contemporaneous Papers—Construction.*—Where two papers are executed at the same time, or contemporaneously, between the same parties, in reference to the same subject matter, they must be regarded as parts of one transaction, and receive the same construction as if their several provisions were in one and the same instrument. *Portsmouth Refining Co. v. Oliver R. Co.*, 513.
7. *Contract Preliminary to Deed—Specific Exceptions—Presumption—Deed.*—When, to complete the performance of a prior contract and as a preliminary to a conveyance of property, parties make an agreement stipulating for the future adjustment of certain specific matters of difference between them, the law assumes that they intended that, with the exception of the things named, the provisions of the contract should, in all respects, be treated as satisfied by the conveyance made. *Portsmouth Refining Co. v. Oliver R. Co.*, 513.
8. *Engineer's Estimates—Gross Errors—Fraud.*—Notwithstanding the fact that a contract provides that the decision of the chief engineer of one of the parties shall be final as between the parties as to all questions arising under the contract, the other party will not be precluded from recovering the correct amount due him for work done under the contract where the engineer's estimates or classifications are so grossly erroneous as to amount to a fraud upon the rights of the injured party. It is not necessary to allege or prove bad faith, or an intention to commit fraud on the part of the engineer. It is enough that his estimates or classifications are so grossly erroneous as to amount to fraud. This doctrine is not in conflict with the rule that fraud must be established by clear and satisfactory evidence. *Cornell v. Steele*, 589.
9. *Railroads—Contract for Right of Way—Recitals—Contract to Construct Road—Specific Performance.*—The recital, in a con-

tract between a railroad company and a land owner for the purchase of a right of way, that the company proposes to build a railroad "from the West Virginia line, at or near New River, through Southern Virginia to tidewater," constitutes only an inducement to the contract, the truth or falsity of which would exert proper influence with the court in exercising its discretion in granting or refusing specific performance, but does not impair the force or effect of the contract where the recital is made in good faith and is true. *Tidewater Railway Co. v. Hurt*, 204.

See CORPORATIONS, 10; DEEDS, 1; EVIDENCE, 5; FRAUD, 1; MUNICIPAL CORPORATIONS, 2; PRINCIPAL AND AGENT, 1; RAILROADS, 2; SALES, 1, 8; USAGE OF TRADE, 1; VENDOR AND PURCHASER, 1, 6, 8; WAIVER, 1.

CONTRIBUTION. See APPEAL AND ERROR, 12.

#### CORPORATIONS.

1. *Equitable Assignment of Whole Stock—Debts of Corporation—Liability at Law.*—A transfer of the stock of a foreign corporation to one person to be held for the benefit of another fastens upon the latter an equitable liability for the debts of the company, but confers no liability which can be enforced against him at law. *Mountain Lake Co. v. Blair*, 147.
2. *Promoters—Agency—Secret Profits.*—Although a promoter is not strictly an agent of, or a trustee for, a company before its creation, the rules of principal and agent and of trustee and beneficiary have been extended to meet such cases, and a promoter of such a company is accountable to it as if the relation of principal and agent, or of trustee and beneficiary had actually existed. His acts are carefully scrutinized, and he is precluded from taking a secret advantage of other stockholders. *Jordan v. Annex Corporation*, 625.
3. *Promoter's Profits—Rights of Promoter as Creditor.*—Although a corporation is entitled to recover from a promoter the amount of profits which he has made out of the secret agreement, he is not debarred, as a creditor for money advanced to the corporation, from sharing in the assets of the company along with its other creditors. *Jordan v. Annex Corporation*, 625.
4. *Liability of Promoter—Exemption from Liability—Evidence—Credit to Corporations.*—A promoter cannot be held liable in the face of the contract against liability, fairly and legally entered into; and, in determining the question whether or not he has been freed from liability by the other contracting party,

facts as to the latter's act, or of an agreement that he was not to be held liable, are not to be ignored. The fact that no bill was ever rendered to the promoter, but credit was given on the books of the creditor to the corporation, the goods delivered to it, and payments received from it, and that no demand was made upon the promoter until after the solvency of the corporation became questionable, are very potential in the determination of the question of the liability or non-liability of the promoter. *Strause v. Richmond, &c. Co.*, 724.

5. *Liability of Promoters—Instructions—Partial View of Evidence.*—The tendency of modern decisions is to hold that those dealing with promoters shall have the double security of the promoter and of the corporation when one is formed, unless it clearly appears that the liability of the promoter was not intended, or that it was intended to be released when the liability of the corporation began. If, however, there is evidence tending to show that it was not the intention of the contracting parties that the promoter should be liable, but that the corporation and not the promoter should be liable, and it was in fact looked to and part payments received from it until insolvent, an instruction which directs the attention of the jury to that part only of the evidence, which tends to fix a liability on the promoter, and ignores that which tends to support a different conclusion, and authorizes a verdict on the evidence thus singled out, is misleading and constitutes reversible error. *Strause v. Richmond, &c. Co.*, 724.
6. *Liability of Stockholders to Creditors—Assignee of Stockholder.*—Creditors of a corporation may compel payment of the stock subscribed for, so far as it is necessary to satisfy debts by the company. The whole subscribed capital is a trust fund for the payment of creditors when the company becomes insolvent. Not only is the original subscriber liable, but a transferee of stock, with notice that it has not been paid for, is liable to the same extent as the original holder. He succeeds to the liabilities as well as the rights of the transferree. *Mountain Lake Co. v. Blair*, 147.
7. *Municipal—Public—Manchester and Richmond Free Bridge Company—Legislative Control—State Corporation Commission.*—The Manchester and Richmond Free Bridge Company is neither a municipal corporation nor a public institution owned and controlled by the State, in contemplation of article XII of the Constitution of this State, and hence the General Assembly had no power to pass the act approved March 5, 1908, entitled: "An act to amend and re-enact sections 3, 4, 5 and 9, of an act approved April 2, 1902, entitled: 'An act to incorporate the Manchester and Richmond Free Bridge Company,' and granting certain powers to said company, and"



the city councils of the cities of Richmond and Manchester, for public purposes." This power is vested in the State Corporation Commission. *Commonwealth v. Manchester & R. F. Bridge Co.*, 499.

8. *Resident Stockholder in Foreign Corporation—Liability for Debts—Domestic Affairs of Foreign Corporation—Parties—Contribution.*—A suit by a resident creditor of a foreign corporation against a resident stockholder of such corporation to collect a debt out of the stockholder's unpaid subscription is not an interference with the domestic affairs of a foreign corporation. Other stockholders, if any, and other creditors of the company, if any, are not necessary parties to the suit. Nor is it necessary to wind up the foreign corporation in order to enforce such liability. The liability of the stockholder is several, and not joint. The defendant cannot complain that others equally liable are not sued. If he is compelled to pay more than his proportionate share of the debt asserted, he can compel contribution from the remaining stockholders. *Mountain Lake Co. v. Blair*, 147.
9. *Resident Stockholder of Foreign Corporation—Liability for Debts of Corporation.*—A resident creditor of a foreign corporation may enforce in this State the liability of a resident stockholder upon his subscription to the stock of said corporation in a court having jurisdiction over such stockholder. The liability rests upon contract, and may be enforced in any court having jurisdiction of the stockholder. *Mountain Lake Co. v. Blair*, 147.
10. *Stock Subscription—Fraud—Rescission by Subscriber—Restitution—Case in Judgment.*—A stockholder in a joint stock company who has been induced to subscribe by fraudulent representations of material facts may, upon discovery of the fraud, elect to rescind his contract of subscription if he can restore what he has received in the same state or condition in which he received it, and sue for and recover back what he has paid or given. But where, as in the case in judgment, a company is organized to lease land and erect a building thereon, and two-thirds of the term of the lease have expired, the money paid in by the stockholders has been spent and the company is insolvent, this remedy is not available to such a stockholder, because the parties cannot be placed *in statu quo*. *Jordan v. Annex Corporation*, 625.
11. *Unpaid Stock Subscriptions—Effect of Section 1103a, Code 1904.*—The only questions committed to the jurisdiction of the common law courts by section 1103a, Code 1904, relating to the enforcement of unpaid stock subscriptions in joint stock companies are those involving the validity of the subscriptions

of resident subscribers. The statute has no application to a suit brought by a resident creditor of a foreign corporation who is attempting to enforce the equitable liability of a resident stockholder in such corporation. All that was intended to be accomplished by the statute was to deprive courts of equity of the jurisdiction which they formerly exercised, in winding up insolvent domestic corporations, in enforcing the liability of stockholders for their subscriptions, and to restrict the bringing of actions on the contract of subscription to the courts of law. Apart from this, the statute leaves the jurisdiction of courts of equity unimpaired. *Mountain Lake Co. v. Blair*, 147.

See CONFLICT OF LAWS, 1.

#### COSTS.

1. *Criminal Law—Costs—Enforcement by Auditor—Consent of State—When State Not a Party to Proceedings.*—The auditor of public accounts, under the statute law of this State, is the only officer empowered to institute proceedings for the collection of costs due the State in a criminal prosecution. If the claim for such costs be asserted in a chancery suit by the local attorney for the Commonwealth, without the consent and approval of the auditor, it is a proceeding without authority, the State does not thereby become a party, and is not bound by any decree affecting her rights. The State cannot be impleaded without her consent. *Commonwealth v. McCue*, 302.
2. *Criminal Law—Costs of Prosecution—Execution Without Formal Judgment—Code, Section 4087.*—Under section 4087 of the Code, the accused, in every criminal case, is liable for the costs of his conviction, without any formal entry of the judgment therefor. The clerk of the court is required to make up a statement of all expenses incident to the prosecution and to issue execution therefor as though judgment had been rendered therefor in favor of the Commonwealth against the accused as a fine. The costs are no part of the punishment of the accused, but are given simply to reimburse the State for necessary expenditures in the enforcement of its violated laws. *Com'th v. McCue*, 302.

#### COUNTIES.

1. *Nuisance—Destruction of Dangerous Property—Liability of Counties.*—A county is not liable for property destroyed as a dangerous nuisance by the local board of health. Section 1713d of the Code (1904) authorizes the local board of health to see to the abatement of nuisances, but neither that section, nor any other statute, makes the county liable for the value

of property destroyed as a nuisance, and in the absence of such a statute there can be no recovery therefor. *Louis County v. Yancey*, 229.

See CONSTITUTIONAL LAW, 6, 10; ELECTIONS, 2, 3; RAILROADS, 1; STATUTES, 4; VERDICTS, 2.

COURSE AND DISTANCE. See BOUNDARIES, 1.

COURT-HOUSE. See CONSTITUTIONAL LAW, 6; STATUTES, 4.

COURTS. See APPEAL AND ERROR, 1; CONSTITUTIONAL LAW, 6.

#### COVENANTS.

1. *Restrictive Provisions—Vesting in "Colored" Persons—Corporations.*—A restriction in the conveyance of land to the effect that "the title of this land is never to vest in a person or persons of African decent," or "colored persons" is not violated by a subsequent conveyance of the land to a corporation, organized "to establish and develop a pleasure park for the amusement of colored people." The contemplated use is not prohibited by the restriction nor is the title conveyed to a forbidden person. A corporation is an artificial being totally distinct from its stockholders and directors. *Peoples Pleasure P. Co. v. Rohleder*, 439.

See DEEDS, 2, 4.

#### CRIMINAL LAW.

1. *Amending Verdict—Materiality—Polling Jury.*—When it becomes necessary to amend the verdict of a jury in a matter of substance, it is the safer practice to send the jury to their room where they can find such verdict as they deem proper, untrammelled by the presence or influence of others, but if the amendment is made by the clerk in the presence of the jury, and the jury is then polled and each juror assents to the amended verdict the irregularity is cured. *Burton's Case*, 800.
2. *Appeal and Error—Criminal Law—Appeal by State—Revenue Cases.*—Where the defense to a prosecution for the unlawful sale of malt liquor is that the defendant had the right to sell it at the place where sold, under the revenue laws of the State, the case involves "a violation of a law relating to the State revenue" within the provisions of section 88 of the Constitution, and section 4051 of the Code, and an appeal lies on behalf of the Commonwealth. *Goodwin's Case*, 828.

3. *Concealed Weapons—Commissioners in Chancery—Code (1904, as amended), section 3780 Construed.*—Commissioners in chancery are conservators of the peace (Code, section 3912), and as such may carry concealed weapons, although not at the time acting in the discharge of official duty. The words "while in the discharge of his official duty" used in section 3780 of the Code as amended, apply only to the next antecedent class of officers, to-wit, collecting officers, and not to the other officers named in the statute. *Withers' Case*, 837.
4. *Concealed Weapons—Pistol In Saddlebags—"About His Person"—Constructive Offenses.*—A pistol in a scabbard and in a pair of saddlebags, with the lids down, though the saddlebags be in the hand, does not fall within the language of the statute which says: "If a person carry about his person hid from common observation any pistol," etc. The words "about his person" must mean that it is so connected with the person as to be readily accessible for use or surprise, if required. The act described must be within the spirit and letter of the statute in order to constitute a crime, and this is neither. There are no constructive offenses. *Sutherland's Case*, 834.
5. *Strict Construction—Constructive Offenses.*—Criminal statutes are construed strictly against the State and in favor of the liberty of the citizen. No man incurs a penalty unless the act which subjects him to it is clearly within the spirit and letter of the statute which imposes such penalty. There are no such things as constructive crimes. *Withers' Case*, 837.
6. *Cumulative Punishment—Indictment for Murder—Code, sections 3905, 3906.*—The cumulative punishment provided by sections 3905 and 3906 of the Code for habitual offenders applies solely to cases where the accused is indicted and prosecuted for offenses punishable by confinement in the penitentiary, and not to indictments and prosecutions for capital felonies, though in such cases the jury may, in their discretion, find the accused guilty of a lesser offense. The statutes are highly penal and do not apply to cases which *may*, but to those which *must*, upon a strict construction, come within their language. *Wright's Case*, 847.
7. *Evidence—Death of Witness Between Trials—Proofs of Former Testimony.*—If a witness for the prisoner in a criminal prosecution has been examined and cross-examined at one trial and dies before a second trial of the case, his testimony given on the first trial may be proved by the prisoner on the second trial. *Finn's Case*, 5 Rand. 701, and *Brogy's Case*, 10 Gratt. 722, explained. *Parks' Case*, 807.
8. *Dying Declarations—Motive for Killing.*—The dying declaration of deceased that he did not know any motive on the part of

the prisoner for shooting him, except that he was angry because deceased had refused to rent him a piece of land, is admissible in evidence, though not conclusive of the fact; and it is competent for the prisoner to contradict it by showing that he was not informed of the purpose of the deceased with respect to the land until after the homicide had been committed. *Wright's Case*, 847.

9. *Evidence—Remarks of Prisoner in Jail—Motive.*—On a trial for murder, it is competent for the Commonwealth to prove remarks of the prisoner while in jail that "he did not begrudge what he had done (though he did not say what he had done) \* \* \*, that he had it to do, and if it were to do over again he would do it." Although he did not mention the name of the deceased in that connection, yet if he had reference to some other transaction it was competent for him to show it. *Wright's Case*, 847.
10. *Husband and Wife—Desertion of Wife by Husband—Destitute and Necessitous Circumstances—Case at Bar.*—The evidence in this case does not show that the wife was at any time in destitute and necessitous circumstances within the meaning of the statute punishing a husband for deserting his wife "in destitute or necessitous circumstances," and the judgment of conviction of the husband therefor is therefore set aside. *Burton's Case*, 800.
11. *Husband and Wife—Support of Wife—Continuing Duty—Breach.*—The object of the statute punishing the desertion or wilful neglect to provide for a wife or minor children is to compel a husband to support his wife and children, if of ability to do so. It is a continuing duty, and the breach of it may be alleged as of the time of the desertion, or at any subsequent time while the neglect continues. It would be proper in a trial under the statute to tell the jury that the desertion or neglect must have existed at the time the indictment was found. *Burton's Case*, 800.
12. *Husband and Wife—Support of Wife—Desertion by Husband—Sufficiency of Cause.*—A quarrel or series of quarrels between husband and wife for which wife is responsible in whole or in part, do not constitute just cause for desertion on the part of the husband, or for his wilful neglect to provide for her support and that of their minor children. *Burton's Case*, 800.
13. *Husband and Wife—Support of Wife—Destitute or Necessitous Circumstances—Question for Jury—Review.*—What shall constitute "destitute or necessitous circumstances," under the statute punishing a man for deserting his wife and minor children, depends upon the circumstances of the particular

case, and is a question for the jury subject to review by the court in a proper case and upon familiar principles. *Burton's Case*, 800.

14. *Indictment—Names of Witness—Directory Statute.*—The statute requiring the names of the witnesses upon whose testimony an indictment is found to be written at the foot of the indictment is directory only, and the absence of such names is not a valid objection to the indictment. *Clopton's Case*, 813.
15. *Indictment for Murder—Count Charging Former Conviction of Felony—Surplusage—Evidence of Former Conviction.*—An indictment for murder is not bad on demurrer because it contains a count charging that the accused had been twice before sentenced in the United States to confinement in the penitentiary. The count charging the previous convictions must be rejected as surplusage. But if the prisoner objects to the introduction of evidence of such former convictions, his objection should be sustained, as such evidence tends to unduly prejudice the prisoner before the jury. *Wright's Case*, 847.
16. *Indictment for Murder—Cumulative Punishment.*—If, on an indictment for murder, the prisoner be found guilty of an offense less than murder of the first degree, and sentenced to confinement in the penitentiary, the cumulative punishment provided by sections 3905 and 3906 may be added by proceedings had under sections 4180, 4181, 4182 and 4193 of the Code which are complementary to the prior sections, prevent a possible failure of justice, and spare the accused the injustice of having evidence of prior offenses introduced before the jury when upon trial for murder of the first degree. *Wright's Case*, 847.
17. *Instructions—Case at Bar.*—The instructions given in the case at bar are approved by the court. They relate to murder, malice, manslaughter, presumptions, reasonable doubt, self defence, dying declarations, etc. *Wright's Case*, 847.
18. *Intoxicating Liquors—Spirituous Liquors—Intoxicating Cider.*—Under an indictment for the unlawful sale of "spirituous and malt liquors, whiskey, brandy, wine, ale, beer or mixtures thereof," the defendant cannot be convicted on proof of the sale of intoxicating cider. Cider is not a spirituous liquor, nor does it belong to any of the other classes enumerated. While all spirituous liquors are intoxicating, and all intoxicating liquors are, by force of the act of March 12, 1908, deemed to be ardent spirits, it is certain that all ardent spirits are not spirituous liquors. Malt liquors are intoxicating, but cannot be classified as spirituous. *Donithan's Case*, 845.
19. *Intoxicating Liquors—Meaning of "Malt Liquors."*—The general term "malt liquors" includes both intoxicating and non-in-

toxicating malt liquors, and if a statute specifically forbids the unlicensed sale of malt liquors, the question of the intoxicating properties of the liquor is immaterial. *Goodwin's Case*, 828.

20. *Intoxicating Liquors—Byrd Law—"Malt Beverage"—Compliance With General Law—Violation of Local Charters.*—Where the charter of a town provides that no license shall be granted to any person, club or corporation to sell ardent spirits, malt liquors or any mixture thereof without the written consent of the council of the town and compliance with other provisions of the charter of the town, a brewing company, although it has complied with all the provisions of section 23 1-2 of the Byrd liquor law, is not authorized to sell "malt beverage" in said town through an agent located and doing business there, except with the written consent of the council of the town and a compliance with the other provisions of its charter. Section 28 of the Byrd law expressly provides that nothing in the act shall be construed as changing the provisions of the charter of any town or city touching the granting of license. An agent of such brewing company who has failed to obtain license in said town, and who makes sale of "malt beverages" therein is liable to the penalties prescribed for his default. *Goodwin's Case*, 828.
21. *Indictment—Sufficiency—Charging Sale of Intoxicating Liquor—Delivery.*—An indictment for the sale of ardent spirits without license, substantially in the language of the statute, saying nothing about delivery, is sufficient. The sale includes the delivery. *Clopton's Case*, 813.
22. *Indictment for the Sale of Intoxicating Liquors—Allegation of Time—Name of Purchaser.*—It is unnecessary to allege in an indictment for the unlawful sale of intoxicating liquors, the precise time when, or the person to whom, the sale was made. The charge that the defendant did "unlawfully sell and deliver intoxicating liquors," is sufficient. Nor can the Commonwealth be required to state in advance of its evidence, the time when, or the person to whom, the sale was made. *Clopton's Case*, 813.
23. *Sale of Intoxicating Liquors—Possession of United States License—Constitutional Enactment.*—The statute making the possession of a United States revenue license to sell liquor by one not licensed to sell under the State law *prima facie* evidence of a sale of liquor contrary to the State law is a valid and constitutional enactment. *Clopton's Case*, 813.
24. *Sale of Liquor—Testimony of Defendant—Proof Satisfactory to Jury—Interested Witness.*—A jury is not obliged to believe the testimony of an interested or biased witness, though unimpeached, and the mere fact that a defendant indicted for the unlawful sale of intoxicating liquors, and his confidential

clerk, testify that no illegal sale was made is not good ground for setting aside a conviction founded on evidence of the possession of a United States revenue license, as the statute provides that, in such case, the burden of proof is on the defendant, and that unless he shows by satisfactory proof that he has not violated the law he shall be convicted. Whether the proof was satisfactory or not was a question for the jury, who were not obliged to accept as "satisfactory" the testimony of the defendant and his clerk. *Clopton's Case*, 813.

25. *Seduction—Unmarried Female—Divorced Women.*—A woman who has been married and divorced is not an "unmarried female" within the intendment of section 3677 of the Code providing punishment for the seduction of "any unmarried female of previous chaste character." Criminal laws are not to be extended by construction, but must be limited to cases clearly within the language used. *Jennings' Case*, 821.
26. *Verdict Without Evidence—Case at Bar—Possession of Cocaine.*—The evidence in the case at bar is wholly insufficient to sustain a conviction of the statutory offense of having in possession, cocaine "with intent to sell, give away, or otherwise dispense the same." The cocaine was never ordered to be sent to this State, and only came into her borders as a result of a mistake made by the consignors. The defendant positively refused to receive the same, and never for a moment had any such possession of it as would have enabled him to do any of the acts forbidden by the statute. Upon such evidence no conviction can be rightly had. *Taylor's Case*, 825.
27. *Views—Object—Discretion of Trial Court.*—The purpose of a view is not to supply evidence, but to enable the jury to apprehend it; and whether a view shall be granted or refused lies largely in the discretion of the trial court whose judgment on the question will not be reversed unless plainly wrong. *Stanley's Case*, 796.
28. *Writ of Error—Verdict of Conviction—Conflicting Evidence.*—A verdict of conviction of crime cannot be set aside by this court as contrary to the evidence where the evidence is conflicting on material points. *Stanley's Case*, 796.

See COSTS, 1, 2; STATUTES, 5.

**CROSSING.** See NEGLIGENCE, 1; RAILROADS, 5, 6, 7, 8, 9.

#### **DAMAGES.**

1. *Evidence—Opinions.*—In an action to recover damages for a personal injury it is not error to permit the plaintiff to testify whether he is capable of doing, since he received the injury, such work as he had done theretofore. *Ches. & O. R. Co. v. Hoffman*, 44.



2. *Excessive Damages—Personal Injury.*—A verdict for \$2,500 for personal injuries cannot be set aside as excessive where it appears that the plaintiff fell more than thirty feet, that he was rendered unconscious, that his arm was mashed, his head hurt, his shoulder-blade dislocated, and his ankle badly sprained, and that he had not recovered from his injuries at the time of the trial. *Ches. & O. R. Co. v. Hoffman*, 44.
3. *General Damages—Allegation in Declaration—Bill of Particulars.*—Damages which are the necessary and probable result of an act of omission are termed general, and are legally imported and may be recovered, although not specifically claimed in the declaration. If particulars are desired, they may be demanded under section 3249 of the Code. *City of Richmond v. Wood*, 75.
4. *Personal Injury—Elements of Damage.*—In estimating the damages for a personal injury inflicted on the plaintiff by the negligence of defendant's servants, it is proper to instruct the jury that they may take into consideration the plaintiff's mental and physical suffering arising from his injuries, his loss of wages from the time he was prevented by said injuries from following such calling or business as he could have followed but for said injuries, and that the amount of damages should be reasonable and just to both parties, and should compensate the plaintiff for the loss of money which he would probably earn had not the injuries been inflicted. *Ches. & O. R. Co. v. Hoffman*, 44.
5. *Pleading—Sufficiency of Declaration—Allegation and Proof.*—A declaration which alleges that water and sewerage from a defective city sewer entered into and upon certain property, to-wit, a lot of land with a dwelling thereon owned by the plaintiff, and which concludes with an allegation: "the said plaintiff was otherwise greatly injured and damnified," is broad enough to cover the damage done to all the buildings on the lot. *City of Richmond v. Wood*, 75.

See ATTACHMENTS; APPEAL AND ERROR, 4, 19; CARRIERS, 10, 11; DEATH BY WRONGFUL ACT, 1; FORFEITURES, 2; INJUNCTIONS, 1, 2; VENDOR AND PURCHASER, 2.

#### DEATH BY WRONGFUL ACT.

1. *Verdicts—Excessive—Contrary to Evidence.*—The verdict for \$10,000 in the case at bar, for negligently causing the death of the plaintiff's intestate, cannot be set aside as excessive, nor because it is contrary to the law and the evidence. See *Norfolk and W. R. C. v. Holmes*, ante p. 407. *Norfolk & W. R. Co. v. Munsell*, 417.

See NEGLIGENCE, 4; RAILROADS, 12, 13.

**DECLARATION.** See **APPEAL AND ERROR**, 18; **MASTER AND SERVANT**, 1; **NEGLIGENCE**, 5; **PLEADING**, 1, 3, 4, 5, 7, 8; **RAILROADS**, 9.

**DEEDS.**

1. *Acceptance—Prior Executory Contract.*—Where a deed has been executed and accepted as a performance of an executory contract for the conveyance of real estate the rights of the parties rest thereafter solely in the deed. This is true, although the deed thus accepted varies from that provided for in the contract; and the law remits the grantee to his covenants in his deed, if there is no ingredient of fraud or mistake in the case. *Portsmouth Refining Co. v. Oliver R. Co.*, 513.
2. *Conditions Subsequent—Construction.*—Conditions subsequent are not favored in law, because they tend to destroy estates, and a party who insists upon a forfeiture for a breach of such a condition must bring himself clearly within the condition. *Peoples Pleasure P. Co. v. Rohleder*, 439.
3. *Conditions Subsequent—How Viewed.*—Where title to land has vested any provision by which it is to be divested is regarded as a condition subsequent. Such conditions are not favored in law because they tend to destroy estates. *Potomac Power Co. v. Burchell*, 676.
4. *Conditions Subsequent—Intention—How Ascertained—Case at Bar.*—Conditions subsequent are not favored in law, and are construed strictly because they tend to destroy estates. In determining whether the parties intended to create a covenant or a condition, it is necessary to consider the language employed, the situation of the parties, their relation to the subject of the transaction, and the object in view. The application of this rule to the facts of the case at bar shows that a covenant and not a condition subsequent was intended. *Shreve v. Norfolk & W. R. Co.*, 706.
5. *Delivery.*—A deed of trust, duly executed, acknowledged and delivered by the grantor to one of several trustees named therein and accepted by the latter without condition is sufficiently delivered, and operates a complete divestiture of the grantor's title to the property conveyed, and invests it in the grantees, upon the trusts and for the uses declared by the deed. *Hall v. Hall*, 117.
6. *Delivery—Case in Judgment.*—As to one of the appellants, the evidence in this cause shows that if the deed from his father under which he claims an interest in the land in controversy was ever delivered, he reconveyed any and all interest he had in the land to his father two years before the father conveyed the land to one under whom the appellee claims title, and that this latter deed was delivered to the father. The

said appellant so testified three years after the date of his deed to his father, and his conduct after the date of that deed is consistent with his testimony, and inconsistent with his present claim to an interest in the land. *Nash v. Yellow Poplar Co.*, 14.

7. *Fee Simple—Limitation Over of What Remains.*—Under a deed which conveys land to a trustee for the benefit of a married woman, with power to her to sell and dispose of the property and make such disposition of the proceeds of sale as she may think proper, the married woman takes an equitable fee simple estate in the property and a limitation over to another of any interest in "the property then remaining," is void for uncertainty and repugnancy. *Hunter v. Hicks*, 615.

See ACKNOWLEDGEMENTS; CONTRACTS, 7; COVENANTS, 1; DESCENTS AND DISTRIBUTIONS, 1; RAILROADS, 3.

DEFICIENCY IN LAND. See VENDOR AND PURCHASER, 2, 7.

DEMURRER. See APPEAL AND ERROR, 18; EQUITY, 4, 7; PLEADING, 4, 7, 8, 10, 11, 12, 13, 14.

DEMURRER TO EVIDENCE.

1. *Concessions of Demurrant.*—On a demurrer to the evidence, the party demurring is considered as admitting the truth of his adversary's evidence, and all just inferences that can be properly drawn therefrom by a jury, and as waiving all of his own evidence which conflicts with that of his adversary, and all inferences from his own evidence which do not necessarily result therefrom. Moreover, if the evidence is such that the jury might have found a verdict for the demurree, the court must grant judgment in his favor. *Richmond v. Barry*, 274.
2. *Denial of Jury Trial.*—The right to demur to the evidence is no longer an open question in this State. The demurrer does not invade the province of the jury as triers of disputed facts, but, assuming that the evidence demurred to is true, the court is called upon to determine whether such evidence, as a matter of law, warrants a judgment for the demurree. It is a supervisory power invoked and exercised by the courts, whose duty it is to decide questions of law arising upon undisputed facts. *Lynchburg Milling Co. v. Bank*, 639.
3. *Detached Statement of Witness—Testimony as a Whole.*—On a demurrer to the evidence, it is not permissible to take detached statements of a witness for the demurrant, and say that that particular statement is not contradicted by evidence for the demurree, but the statement of the witness must be taken as

a whole, and if, when so considered, it cannot be reconciled with the demurree's evidence it must be rejected. *Norfolk & W. R. Co. v. Holmes*, 407.

4. *Joinder—Insertion of Evidence—Stenographer's Report.*—A demurrer to evidence must contain a statement of the evidence, and until it is inserted the opposing party cannot be required to join in the demurrer. It need not be a stenographer's report of the evidence. Indeed the practice of inserting the stenographer's report of the evidence, with all of its irrelevant and immaterial matter, is not to be commended. All that is required of the demurrant is to have the evidence correctly stated in the demurrer. The old practice of inserting simply the substance of the oral testimony material to the issues raised is in most cases and with most witnesses the better one, and should be encouraged. *Newport News, &c. R. Co. v. Nicolopoulos*, 165.
5. *Room for Difference of Opinion.*—On a demurrer to the evidence by the defendant, in an action to recover damages for a personal injury negligently inflicted on the plaintiff by the defendant, if the evidence is such that reasonable men might well differ as to whether the defendant was guilty of negligence, or the plaintiff by his own negligence so far contributed to his injury as to bar recovery, the demurrer should be overruled. *Ches. & O. R. Co. v. Hoffman*, 44.
6. *When to be Decided for Demurree.*—Where the evidence is such that a jury would have been warranted in finding a verdict for the demurree to the evidence, the court must so find. *Phillips v. Southern R. Co.*, 436.

**DEPOT.** See RAILROADS, 3.

#### DESCENTS AND DISTRIBUTIONS.

1. *Surviving Wife—Distributive Share—Conveyance of Personality by Husband—Wills.*—While a husband cannot, by will, defeat his wife's claim to her distributive share in his personal estate, he may do so by an irrevocable disposition of his property in his lifetime, although he secures a life estate to himself, and his purpose is to defeat the claim of his wife as one of his distributees. An irrevocable deed of trust is not to be considered a will in disguise, merely because it disposes of nearly all of grantor's personal estate and reserves to the grantor the possession and control of the property during his life. *Hall v. Hall*, 117.

**DESCRIPTION.** See SALES, 2.

**DESERTION.** See CRIMINAL LAW, 10, 11, 12, 13.

DISMISSAL. See APPEAL AND ERROR, 12.

DOWER. See EMINENT DOMAIN, 2.

DUE PROCESS. See CONSTITUTIONAL LAW, 1.

DURESS. See WILLS, 8.

DYING DECLARATIONS. See CRIMINAL LAW, 8, 17.

#### ELECTIONS.

1. *Constitutional Law—Qualification of Electors—Special Elections—Ward Act.*—In view of the foregoing rules of interpretation, the policy of the State from the foundation of the government until now of permitting the legislature to fix the electorate for all special elections except for officers elective by the people, and the construction placed upon similar provisions of the Constitutions of other States of the Union, the language of section eighteen of the schedule to the Constitution of 1902, "in all elections held after this Constitution goes into effect, the qualifications of electors shall be those required by article II of this Constitution," is applicable only to elections provided for by the Constitution and schedule, and not to other elections which the legislature may see fit to order. As to the latter, the legislature has the power to fix the electorate. Hence the act approved February 25, 1908, (Acts 1908, p. 83), commonly known as the Ward Act, prescribing the qualification of voters in special and local option elections, in so far as it affects elections not provided for by the Constitution and schedule is a valid exercise of legislative power. *Willis v. Kalmbach*, 475.
2. *County Bonds—Roads—Disqualified Voters.*—If residents and voters in a town exempt from road tax are allowed to vote indiscriminately with other residents of the magisterial district in which the town is located at an election held under the act of March 8, 1908, "to provide for the issuing of county bonds for permanent road improvement in the magisterial districts of the counties of the State" (Acts 1906, p. 105), which contains a proviso, "that no voter shall be allowed to vote in said election who resides and is a voter in a town exempt from road-tax," such election is void, as it is not held agreeably to the mandates of the statute. *Eggborn v. Culpeper County*, 94.
3. *Mistake—County Bonds.*—Where a bond issue is voted by all the voters in a magisterial district, which embraces an incorporated town, on the theory and in the belief that the town was to participate in the benefits and bear a corresponding

portion of the burden of the bond issue, and this theory and belief turn out to be erroneous, the election should be set aside and the bond issue annulled. *Eggborn v. Culpeper Co.*, 94.

4. *Payment of Poll Tax—Treasurer's List.*—The decision of this court in *Tazewell v. Herman*, 108 Va. 416, to the effect that a treasurer of a city or county should embrace in the list which he is required to file with the clerk the names of only such persons as have *personally* paid their poll taxes within the time prescribed by law is correct, and is adhered to. *Tilton v. Herman*, 503.
5. *Poll Tax—"Personal" Payment—Constitutional Law.*—The words "*personally paid*" as used in section 21 of article II of the Constitution of this State mean that the tax therein referred to must be paid by the voter out of his own estate or means and not by another out of that other's estate or means. The payment need not be by the voter in proper person. His bodily or physical presence is not necessary. It is enough if the payment be out of the tax payer's estate or means; and the actual payment may be by the tax-payer himself or by his check, or through the hands of his clerk or authorized agent, or perhaps in other ways. *Tilton v. Herman*, 503.
6. *Poll Tax—"Personal" Payment—Treasurer's List.*—If a record in the treasurer's office sufficient to enable a newly-elected treasurer to certify who has personally paid their poll taxes for the previous years be not kept, the legislature has the power to require such a record to be kept, but the fact that this has not been required heretofore has no bearing upon the determination of the question as to what is meant by the words "*personally paid*" or "*personally pay*" used in the Constitution. *Tilton v. Herman*, 503.

**ELECTRICITY.** See EMINENT DOMAIN, 3.

**ELEVATORS.** See CARRIERS, 9.

**EMERGENCY.** See NEGLIGENCE, 7, 8.

**EMERGENCY CLAUSE.** See STATUTES, 2.

**EMINENT DOMAIN.**

1. *Constitutional Law—Eminent Domain—Public Use—Police Power—Destruction of Property as a Dangerous Nuisance.*—Destroying property because it is a dangerous nuisance is not an appropriation to a public use, but is to prevent its use by the owner, and end its existence, because it cannot be used by the owner without injury to others. In abating such nuisances, the public does not exercise the power of eminent domain, but the police power. *Louisa County v. Yancey*, 229.

2. *Judgments—Fraud in Procurement—Collateral Attack—Condemnation Proceedings—Wife as Party—Dower.*—A wife having an inchoate right of dower in land is not a necessary party to a lawful proceeding against her husband to condemn the land for a public use, but is concluded by the judgment on the principle of representation, however irregular the proceedings or erroneous the judgment may be, but if the court was induced to render the judgment of condemnation by the fraudulent concealment of facts upon which it was founded, the wife, upon the death of her husband, may file her bill to set aside the condemnation proceedings and have dower assigned her in the land. A judgment or decree voidable for fraud practised upon the court which rendered it, and which is extrinsic and collateral to any issue submitted to the determination of the court may be impeached collaterally. *Justis v. Georgia Industrial Co.*, 366.
3. *Municipal Corporations—Electric Lights—Public Use.*—The power and duty to supply the inhabitants of a town with electric lights is a public use, and the necessity for its exercise, and the extent to which it may be exercised, including the right to condemn property outside the territorial limits of the town are questions for the determination of the legislature, and are not open to enquiry before the courts. *Miller v. Pulaski*, 137.
4. *Payment of Compensation Into Court—Vesting of Title.*—Upon payment into court of the sum ascertained to be a just compensation for land condemned for a public use, the title to the land for which compensation is allowed vests absolutely in the company in fee simple, under the provisions of section 1079 of the Code. *Potomac Power Co. v. Burchell*, 676.
5. *Private Use—Concealment of Fact—Collateral Assault—Resolutions of City Council.*—The fact that condemnation proceedings were set on foot by resolutions of a city council is no reason why a judgment of condemnation obtained from the court by a fraudulent concealment of the fact that the land was not needed, or to be used for a public use, should not be collaterally assailed. *Justis v. Georgia Industrial Co.*, 366.
6. *Public Use.*—A use to be public need not be for the use and benefit of the whole public or State, or any large part of it. It may be for the inhabitants of a very small or restricted locality; but the use and benefit must be in common, not to particular individuals or estates. *Miller v. Pulaski*, 137.
7. *Public Use—When a Judicial Question.*—Whether a particular use is public or not is a question for the judiciary, and not for the legislature, but if it is in fact public, the expediency of exercising the power of eminent domain, the instrumentalities to be used, and the extent to which the right shall be delegated

are questions for the legislative branch of the government. *Miller v. Pulaski*, 137.

8. *Public and Private Use Combined—Municipal Corporations.*—An act which authorizes a town to condemn land for the purpose of supplying the inhabitants of said town "or other persons, companies, or corporations," with electric lights or power embraces an object which is constitutional with one which is unconstitutional, and they are so united as to be inseparable, and hence the whole grant of power is unconstitutional. The right to furnish lights or power to "other persons, companies or corporations" is a private use, and where a private use is so combined with a public use that the two cannot be separated the whole act is void. *Miller v. Pulaski*, 137.

**ENGINEER'S ESTIMATES.** See **CONTRACTS**. 8; **MUNICIPAL CORPORATIONS**, 2.

## **EQUITY.**

1. *Commissioner in Chancery—Judicial Officer—Report—Assistance of Parties.*—A commissioner in chancery is a quasi judicial officer, and his work should be free from all suspicion of being improperly influenced or interfered with by any party to the suit, or his agent. He should not allow an agent of a party to take any part in the preparation of his report, or papers returned as a part of such report. In the case in judgment, the paper filed with the report was not a finding of the commissioner, and was only useful as an aid in examining the great volume of evidence to which it refers. The evidence is all in the record, and can be examined without the aid of the paper, and hence no injury was suffered by reason of its return with the report. *Mountain Lake Co. v. Blair*, 147.
2. *Equity Pleading—Allegations of Actual Fraud—Constructive Fraud.*—Although a bill alleges actual fraud and contains a special prayer for relief on that ground if the facts alleged also make out a case of constructive fraud and these facts are established, relief may be afforded on the latter ground. *Branch v. Buckley*, 784.
3. *Equity Pleading—Amendments.*—The question of amending pleadings in chancery is largely in the discretion of the trial court. In the case in judgment there is nothing in the character of the amendments, nor the circumstances under which they were made, that shows that the discretion of the trial court was improperly exercised. *Branch v. Buckley*, 784.
4. *Equity Pleading—Demurrer Sustained—Amendment—Effect.*—When a demurrer to a bill in equity is sustained, with leave to the complainant to amend, if he exercises the privilege, he



cannot afterward be heard to object to the decree on the original bill. *Tidewater Railway Co. v. Hurt*, 204.

5. *Equity Pleading—Multifariousness.*—In a general way, a bill is said to be multifarious which improperly joins entirely distinct and independent causes of action against one or more defendants, or impleads several defendants touching matters of a distinct and independent nature, but in cases involving the question of fraud, a very great latitude is allowed in pleading, both as to the circumstances charged and parties impleaded, provided one connected scheme of fraud be averred. If justice can be conveniently administered by the mode of procedure adopted, the objection of multifariousness will not lie, unless it is so injurious to one party as to render it inequitable to accomplish the general good at his expense. *Baker v. Berry Hill Co.*, 776.
6. *Equity Pleading—Numerous Exceptions—Overruling in Gross.*—It is not error for a trial court to refuse to pass specifically and directly on numerous exceptions to evidence and the report of a commissioner in chancery, and its decree overruling all such exceptions, in a general way, will not be disturbed where it appears that the conclusion reached is correct, and there is sufficient evidence, free from all reasonable objection, to sustain said conclusion. *Mountain Lake Co. v. Blair*, 147.
7. *Equity Pleading—Prayer for Alternative Relief—Demurrer.*—A bill is not objectionable on the ground that it contains a prayer for relief framed in the alternative. That is the common and correct practice where the exigencies of the case require it. *Baker v. Berry Hill Co.*, 776.
8. *Equity—Supplemental Bills—Office of.*—One of the chief offices of a supplemental bill is to bring into the case new events referring to and supporting, or affecting, rights and interests already mentioned, which have arisen subsequently to the filing of the original bill. *Bibb v. American Coal Co.*, 261.
9. *Equity Pleading—Vacation Decree—Subsequent Ratification.*—Although a decree may have been entered by a judge without authority in vacation, if, at a subsequent term, the court, with full jurisdiction of the subject-matter and the parties, "ratifies, approves, confirms and adopts" the vacation decree, it then becomes the decree of the court, and will not be disturbed if no prejudicial error is discovered therein. *Mountain Lake Co. v. Blair*, 147.

See CORPORATIONS, 11; VENDOR AND PURCHASER, 2.

ESTATES. See DEEDS, 7; FEE SIMPLE, 1; WILLS, 1, 6.

**ESTOPPEL.**

1. *Conduct of Party—Case in Judgment.*—In 1869 a father conveyed his undivided half-interest in a boundary of land to his four children in consideration of love and affection. In a suit to partition the land in 1886 a purchaser from one of the children claimed a fourth interest in the father's moiety. In that suit one of the sons who now claims a fourth interest in said moiety, and is one of the appellants in this cause, testified that the deed of 1869, under which he now claims, never became operative, that he took nothing under it, and that the interest which it purported to convey still belonged to his father. About two years thereafter the father sold and conveyed a moiety of the boundary to one under whom the appellees now claim. In 1906 the present suit for partition of said boundary was brought by the said son and his brother. The evidence shows that the said son was present aiding his father in making the sale above mentioned, that he saw one-half or more of the purchase money paid to his father without objection—without asserting title to or claiming interest in the land—and that the purchaser thereof did not know of the claim which he is asserting in this suit, and did not have any convenient means of acquiring such knowledge.

*Held:* Under this state of facts it is clear that the said son is not entitled to the relief sought. *Nash v. Yellow Poplar Co.*, 14.

2. *Refusal of One Court to Take Jurisdiction—Application to Another Court.*—The refusal of a court to take jurisdiction of a claim because another court of competent jurisdiction has sole jurisdiction of the case does not estop the creditor from asserting his claim in the latter court. *Com'th v. McCue*, 302.

See **BANKS AND BANKING**, 3; **INJUNCTIONS**, 4; **PLEADING**, 16; **WAIVER**, 1.

**EVIDENCE.**

1. *Admission of Fact—Exclusion of Evidence Tending to Prove Same Fact.*—Where the plaintiff, in an action against a railroad company for an assault and battery upon him by a brakeman, testifies that he was very drunk when he boarded the train, the exclusion of testimony as to his drunken and disorderly condition before boarding the train is not reversible error. *Norfolk & W. R. Co. v. Brame*, 422.
2. *Carriers—Damages to Stock—Evidence—Values Six Weeks After Injury.*—In an action to recover damages of a carrier for an injury received by a horse while in transit, a witness who saw the horse immediately before shipment and also six weeks thereafter may give his opinion as to the value of the horse at the latter date. The lapse of time affects the weight of the testimony not its admissibility. *So. Express Co. v. Jacobs*, 27.

3. *Carriers—Shipment of Live Stock—Damage in Transit—Evidence of Value—Expenses of Shipper.*—If, in an action against a carrier to recover damages for injuries inflicted on horses in transit, the carrier proves the prices paid by the plaintiff for the horses, the plaintiff may, in rebuttal, show that, in addition to the price paid for the horses, he also incurred heavy expenses in training and developing the horses in order to obtain the price he expected to receive on the market for which they were purchased. *So. Express Co. v. Jacobs*, 27.
4. *Experts—Knowledge of Facts—Hypothetical Questions.*—Before the opinion of an expert, based on facts to which he has not himself testified, can be admitted, he must fully understand the facts already proved, and his testimony must come in response to a hypothetical question embodying the evidence. *City of Richmond v. Wood*, 75.
5. *False Representations—Parol Evidence.*—Parol evidence is admissible to prove that one party was induced to enter into a contract by the false representations of the other. Such evidence is equally admissible, whether the contract was written or verbal. *Farmers Man. Co. v. Woodward*, 596.
6. *Fraud in Procurement of Contract.*—Parol evidence is always admissible to avoid a written contract procured by false and fraudulent representations. *Baker v. Berry Hill Co.*, 776.
7. *Judicial Notice—Municipal Ordinances.*—Courts do not take judicial notice of municipal ordinances, and they must be proved, but when proved they stand on the same footing as statutes. *Norfolk & P. Co. v. Forrest*, 658.
8. *Opinions.*—A witness may state whether or not at a given time he saw anything indicating that a sewer was too small to carry off the water. This is not the expression of an opinion demanding expert knowledge. *City of Richmond v. Wood*, 75.
9. *Opinion of Witness—Qualification—Carriers—Damages to Stock.*—In an action against a carrier to recover damages for an injury inflicted on horses while in transit, a witness who has had large experience with horses, and who knew the particular horses for whose injury the action is brought, their temperament and characteristics, and who knew the kind of stalls in which they were shipped and is familiar with the effect of such confinement upon horses of that class, may give his opinion as to the effect of shipping horses a long distance in such stalls. This is not common knowledge of which the jury would be possessed independent of such evidence. *So. Express Co. v. Jacobs*, 27.
10. *Parol Evidence—Incomplete Writing.*—While parol evidence of prior or contemporaneous agreements will not be received to vary, alter or contradict the terms of a valid written contract.

complete on its face, this rule of exclusion has no application where it is apparent from the writing itself that it does not embody the entire agreement. In such case, the writing being incomplete, it must be supplemented by other evidence, not to contradict or vary its terms, but to establish the real contract between the parties. *Farmers Man. Co. v. Woodward*, 596.

11. *Sickness of Witness—Proof of Testimony at a Former Trial.*—A party who knows when his case is called that a witness is sick, and cannot attend, but goes into trial without moving for a continuance on that account, or mentioning the fact, is not entitled to have read to the jury the stenographer's report of the testimony of the witness given on a former trial of the case. *McCrorey v. Garrett*, 645.

See APPEAL AND ERROR, 15, 16; CARRIERS, 10; CONFLICT OF LAWS, 2; CRIMINAL LAW, 7, 8, 9, 23, 24; DAMAGES, 1; FRAUDS, STATUTE OF, 2; INSURANCE, 1, 2; NEGOTIABLE INSTRUMENTS, 1, 2; OYSTERS, 2, 5; TRIAL, 2; USAGE OF TRADE, 1; WITNESSES, 1, 3, 4, 5, 6, 7, 8.

**EXCEPTIONS.** See APPEAL AND ERROR, 7; EQUITY, 6.

#### **EXECUTIONS.**

1. *Return Before Return Day—Notorious Insolvency.*—A return on an execution "no effects known to me" is not vitiated by the fact that it is made before the return day of the writ, where, as in the case at bar, it is an agreed fact that, at the time the writ was placed in the hands of the officer, the defendants were notoriously insolvent. *Slingluff v. Collins*, 717.
2. *Return of Officer—Lack of Signature—Amendment—Time of Making.*—Where the truth of a return on an execution is not questioned, and no good reason to the contrary is shown, the officer making it should be allowed to amend by signing it, and thus make valid that which before had no appearance of official authenticity. Courts are liberal in allowing amendments of returns in proper cases, so as to conform to the truth, and the amendment when made has the same effect as though it were the original return, where the rights of third persons have not intervened, and it does not appear that injustice can result to anyone. There is no specific time within which a return must be amended, but after a great lapse of time an amendment should be permitted with caution, and in no case should it be allowed unless the court can see that it is in furtherance of justice. *Slingluff v. Collins*, 717.

#### **EXECUTORS AND ADMINISTRATORS.**

1. *Bill to Convene Creditors—When Claims May be Asserted.*—A creditor has the right to assert his claim against the estate of

a decedent in a suit where the estate of such decedent is being administered at any time before the assets of the estate have been administered. *Com'th v. McCue*, 302.

2. *Security of Executors—Application by Creditors of Bankrupt.*—An application to require security of the executrix of one who was, in his lifetime, declared a bankrupt, but whose estate has not been discharged, may be made by creditors of the bankrupt. It is not a proceeding to recover property of the bankrupt which can be only brought by the trustee of the bankrupt, but an application to require security for the safety of a fund in which the creditors deem themselves interested. *Schnurman v. Biddle*, 702.
3. *Security of Executors—When Required—Discretion of Court.*—Under the provisions of section 2642 of the Code, courts of probate are clothed with a wide discretion in the matter of requiring security of executors where the will directs that none shall be given, and the exercise of it should not be disturbed except in a case of plain abuse. It may be required on the application of any person interested, or where the court, of its own knowledge, thinks it ought to be required. *Schnurman v. Biddle*, 702.

See APPEAL AND ERROR, 7.

EXPERTS. See EVIDENCE, 4; WITNESSES, 7, 8.

EXPRESS COMPANIES. See CARRIERS, 2.

FEE SIMPLE.

1. *Estates—Gift of Life Estate—Power Over Fee—Gift Over of What "May be Left."*—A gift of a life estate, with power to the donee to use any and all of principal, vests in the first taker a fee simple in the lands, and an absolute estate in the personal property so given, and a gift over of "what may be left" is void. *Randall v. Harrison*, 686.

See DEEDS, 7; WILLS, 6.

FIRES. See RAILROADS, 10.

FISH. See OYSTERS.

FIXTURES.

1. *Purchasers—Notice.*—A vendee or mortgagee of realty, with notice of the rights of third parties in fixtures, takes subject such rights. *Monarch Laundry v. Westbrook*, 382.

2. *Reservation of Title—Engines and Boilers.*—Engines, boilers and machinery for a laundry are movable personal property, and, if the terms of the statute (Code, section 2462) are complied with, the title thereto may be retained by the vendor, although installed as part of the plant. *Monarch Laundry v. Westbrook*, 382.

## FORFEITURES.

1. *Penalty to Secure Payment of Money—Relief in Equity Case in Judgment.*—Where land is condemned for a public use, and a written agreement is entered into between the owner and the petitioner condemning by which it is agreed that the owner shall withdraw his exceptions to the report of the commissioners, that the report shall be confirmed and the compensation fixed by the commissioners paid into court, and title shall vest in the petitioner, but that he shall pay to the owner a further sum of \$100 on or before five years from that date, and if he fails to do so within the time limited, then the title acquired by the petitioner shall revert to the owner, and the report is confirmed and the compensation fixed by it is paid into court, and by the court to the land owner, but the additional \$100 is not paid within the time stipulated, the provision for the reverter of the title is a mere penalty or forfeiture to secure the payment of that sum with legal interest thereon. *Potomac Power Co. v. Burchell*, 676.
2. *Penalty to Secure Payment of Money—Relief in Equity—Damages.*—A court of equity will relieve against a penalty where its object is merely to secure the payment of a fixed sum of money. The measure of damages for failure to pay money is generally the principal sum with legal interest from the time it fell due. *Potomac Power Co. v. Burchell*, 676.

See DEEDS, 2.

## FRAUD.

1. *Contracts—Obtained by Fraud—Affirmation—Proof Required—Waiver.*—Affirmation of a contract voidable for fraud must be a solemn and deliberate act. When the original transaction is infected with fraud the confirmation of it is so inconsistent with justice, and so likely to be accompanied with imposition, that the courts watch it with the utmost strictness, and do not allow it to stand but on the clearest evidence. No man can be bound by a waiver of his rights unless such waiver is distinctly made with full knowledge of the rights which he intends to waive, and the fact that he knows his rights and intends to waive them must plainly appear. *Fitzgerald v. Frankel*, 603.

2. *Evidence from the Transaction Itself—Case in Judgment.*—While it is true that fraud is not to be assumed on doubtful evidence or circumstances of mere suspicion, but must be alleged and clearly proved, yet a transaction may of itself and by itself furnish the most satisfactory proof of fraud, so conclusive as to outweigh the answer of defendants, or even the evidence of witnesses. The circumstances attending and following a transaction are often of such character as to leave no room to doubt the real object and motive of the parties engaged in it. The facts established in the case in judgment justify the conclusion that the appellants have been defrauded of their property by preparation for the wrong, concealment of the truth, and false statements as to material facts by the other party to the transaction. *Fitzgerald v. Frankel*, 603.
3. *Expressions of Opinion—What Constitutes Opinions—Case at Bar.*—The statements by the owner of a farm containing about 450 acres that about 150 acres of it is in pine timber of which about twenty acres have been burned over; that the timber when cut into cord wood will readily sell on the local market for four dollars per cord, and that the land is specially adapted to potato culture, and will, by the use of fertilizers, yield one hundred bushels of potatoes to the acre, are mere expressions of opinion about matters of an essentially uncertain nature, and though untrue and relied on by one who purchases the land upon the faith of them, do not furnish the basis of an action to recover damages for deceit. The statements are sufficiently indefinite to put a purchaser on his guard to make further inquiry if he regards the matter as material. The mere expression of an opinion, however strong and positive the language may be, is no fraud. *Sarby v. Southern Land Co.*, 196.
4. *Fiduciary Relations—Advantage—Influence.*—Wherever a fiduciary relation exists as a fact between persons, and confidence is reposed on the one side, and there is a resulting superiority and influence on the other, and the inferior is induced by the superior to transfer to the latter valuable property without consideration, or upon an inadequate consideration, such transfer will be set aside by a court of equity. Such a transaction will not be sustained unless the trust relation was for the time being completely suspended, and the inferior acted throughout upon independent advice, and upon the fullest information and knowledge. *Branch v. Buckley*, 784.
5. *Fraudulent Conveyance—Ratification—Receipt of Money—Knowledge of Fraud.*—The receipt of money under a contract voidable for fraud will not be deemed a ratification by the defrauded party, when it does not appear that he had become, or ought to have become, fully aware of the imperfections of the trans-

action and of his right to impeach it, and that in receiving the payment he acted deliberately, and with the intention of ratifying or confirming it. In the absence of facts or circumstances showing this, no act of confirmation, however formal, would be effectual. *Branch v. Buckley*, 784.

6. *Option on Land*.—The mere fact that an option is taken for the purpose of speculation does not constitute fraud or unfair dealing on the part of the person taking the option. *Sarby v. Southern Land Co.*, 196.
7. *Ratification*.—When the original transaction is infected with fraud, the confirmation of it is so inconsistent with justice, and so likely to be accompanied by imposition that courts watch it with the utmost strictness, and do not allow it to stand but upon the clearest evidence. *Branch v. Buckley*, 784.
8. *Representation as to Ownership and Price of Land—Option*.—Pending a valid option to purchase land, the party holding the option is the only one who can make a sale of it or fix a price. A representation, therefore, by the holder of the option that he owns the land, and that it cannot be bought for less than a stated sum is not such a fraud upon a purchaser from him as will entitle such purchaser to recover damages for deceit. The question of ownership was immaterial, and the price was under his control. *Sarby v. Southern Land Co.*, 196.
9. *Suit to Avoid—Promptness—Acquiescence*.—A party having the right to impeach a transaction for fraud, must do so in a reasonable time, but what is a reasonable time must be determined by the facts and circumstances of the particular case. To fix acquiescence on a party it should unequivocally appear that he knew the fact upon which the supposed acquiescence is founded and to which it refers. *Branch v. Buckley*, 784.

See CARRIERS, 3; CONTRACTS, 8; CORPORATIONS, 10; EMINENT DOMAIN, 2, 5; EQUITY, 2; EVIDENCE, 5, 6; RESCISSION, 1, 2; SPECIFIC PERFORMANCE, 1; VENDOR AND PURCHASER, 4.

#### FRAUDS, STATUTE OF.

1. *Debt of Another—Original Promise*.—An agreement by a bank to discount notes with certain collateral, and to carry the loans until a third party can sell the collateral at a stated price and pay the notes from the proceeds, is an original undertaking on the part of the bank, and need not be in writing, although the discount is a part of a scheme on the part of such third person to defraud the makers. *Baker v. Berry Hill Co.*, 776.
2. *Contract to Sell Land—Several Writings—Extrinsic Evidence*.—Different papers may be referred to in order to show a complete contract for the sale of land under the statute of frauds,



but they must of themselves show their relation to the contract sued on, in order that they may be taken together to make the contract. Extrinsic evidence is not permissible to connect another paper with the contract sued on. *Jordan v. Mahoney*, 133.

3. *Sale of Land—Sufficiency of Memorandum—Case at Bar.*—A letter addressed to a real estate broker who has a lot for sale, authorizing him to purchase the lot at a price stated, and which is exhibited by the broker to the owner of the lot, who accedes to the price mentioned, and writes and signs at the foot of the letter, "I accept the above," is not a sufficient memorandum of a sale of real estate within the meaning of section 2840 of the Code. In order to give the letter any effect, the broker would have to act on the authority given him in the letter by making the purchase and executing, as agent, a memorandum in writing. Unless and until this was done there was no memorandum in writing signed by the person to be charged or his agent. *Jordan v. Mahoney*, 133.

GIFTS. See FEE-SIMPLE, 1.

#### HIGHWAYS.

1. *Public Use—Streets—Legislative Control—Delegation of Control.*—The highways of the Commonwealth, whether urban or rural, belong primarily to the public, and the legislature has absolute dominion over them, and while the control of streets is commonly delegated to the municipalities in which they are located in such measure as the legislature sees fit to bestow, still the use of them remains in the public at large subject only to such limitations as the municipalities are authorized by law to impose. *White Oak Coal Co. v. Manchester*, 749.

See MUNICIPAL CORPORATIONS, 10, 12; NUISANCE, 1: RAILROADS, 1, 7, 8.

HUSBAND AND WIFE. See CRIMINAL LAW, 10, 11, 12, 13; DESCENTS AND DISTRIBUTIONS, 1.

#### INDEPENDENT CONTRACTOR.

1. *Liability to Third Persons.*—Except under peculiar circumstances, an independent contractor is not liable for an injury to the person or property of one not a party to the contract, occurring after the independent contractor has completed the work and turned it over to the owner or employer, and the same has been accepted by him, though the injury resulted from the contractor's failure to properly perform his contract. *McCrorey v. Thomas*, 373.

See MASTER AND SERVANT, 8; MUNICIPAL CORPORATIONS, 6; NEGLIGENCE, 4; RAILROADS, 4.

INDICTMENT. See CRIMINAL LAW, 14, 15, 16, 21, 22.

INFANTS. See VENDOR AND PURCHASER, 5.

INFERENCES. See TRIAL, 1.

## INJUNCTIONS.

1. *Injunction Bond—Measure of Damages.*—Where a lessor who has leased premises to a tenant for the sale of liquor and for no other purpose whatever, is enjoined from permitting liquor to be sold on the leased premises by a third person, who gives an injunction bond with condition to pay all costs and damages that may be incurred by reason of the injunction, if the same should be dissolved, the obligors in the injunction bond are liable to the lessor, upon dissolution of the injunction, for the rent he should have received during the time the injunction was in force. He could not collect the rent of the tenant, and the loss is properly placed on the party ultimately responsible for the injury. *Columbia A. Co. v. Pine Beach Corp'n*, 325.
2. *Injunction Bond—Temporary Injunction—Damages Sustained After Injunction is Made Permanent.*—In an action upon an injunction bond, given at the time a temporary injunction is granted, and "conditioned to pay all such costs as may be awarded against said plaintiff, and all such damages as shall be incurred in case the said injunction be dissolved," the obligors are liable for whatever costs and damages were incurred and suffered from the time the injunction was granted until it was finally dissolved after an appeal, and their liability is not limited to the time when the temporary injunction was made permanent by the trial court. *Columbia A. Co. v. Pine Beach Corp'n*, 325.
3. *Injunction Order—"Bond Conditioned According to Law"—Effect—Code, Section 3442.*—An injunction order requiring an injunction bond to be given with condition "according to law" is sufficient authority to the clerk to make the condition "to answer all costs and damages that may be incurred by reason of the suing out the injunction in case the same shall be dissolved," and is a substantial compliance with the provisions of section 3442 of the Code directing the court to prescribe the condition of the bond. It is the usual, if not almost the universal, practice of the courts of original jurisdiction to prescribe the conditions of such bonds in this manner when the circumstances are not such as to render special conditions necessary. *Columbia A. Co. v. Pine Beach Corp'n*, 325.

4. *Obligor in Injunction Bond*.—A plaintiff who has executed an injunction bond, and has obtained and acted upon the injunction is estopped to deny his liability upon the bond. *Columbia A. Co. v. Pine Beach Corp'n*, 325.

#### INSTRUCTIONS.

1. *Applicability to a Single Count*.—If an instruction properly states the law applicable to the facts which the plaintiff has pleaded and undertaken to prove, it need not tell the jury to which count of the declaration it is applicable, in the absence of a request to that effect, or some circumstances rendering it necessary. *City of Richmond v. Wood*, 75.
2. *Assuming Facts*.—If an instruction assumes as a fact that which the uncontradicted evidence in the case clearly establishes, this is not prejudicial error. *Newport News, &c. R. Co. v. Nicolopoulos*, 165.
3. *Conflicting*.—A material error in an instruction complete in itself is not cured by a correct statement of the law in another instruction. The two being in conflict, the verdict of the jury will be set aside, as it cannot be told by which instruction the jury was controlled. *Amer. Locomotive Co. v. Whitlock*, 238.
4. *Conforming to Alternative Theories*.—Where the evidence presents two theories of a case, upon one of which the defendant is liable and the other not, it is proper to instruct the jury upon the alternative theories. *Washington So. Ry. v. Cheshire*, 741.
5. *Different Theories of Case—Verdicts*.—Where there is evidence, tending to support the contention of the plaintiff as well as that of the defendant, and it is sufficient to support a verdict, it is proper to instruct the jury on each theory of the case, and a verdict for either party cannot be set aside as contrary to the evidence. *Riverside Co. v. Husted*, 688.
6. *Two Theories of Case—Evidence to Support Each*.—When two theories of a case are presented by the evidence, upon one of which the jury has been sufficiently instructed, it is error to refuse an instruction based upon the other theory of the case, which, if sustained, would require a different verdict. *New York, &c. R. Co. v. Wilson*, 754.
7. *Evidence to Support*.—Since the abolition of the *scintilla* doctrine, an instruction ought not to be given when the evidence upon which it is based is clearly insufficient to sustain a verdict. *Amer. Locomotive Co. v. Whitlock*, 238.
8. *Evidence to Support—Necessary Inferences—Case at Bar*.—Where, in an action against a city to recover damages resulting from falling into a hole in the street, the evidence for the plaintiff tended to show that the hole into which he fell was

left unguarded and unlighted, while the evidence for the defendant tended to show that it had been left guarded and lighted only three-quarters of an hour before the accident, it was for the jury to reconcile the evidence, if possible, and an instruction to the effect that the city was not liable if the lights were extinguished and removed without its knowledge or consent between the time they were placed and the time of the accident cannot be said to be without evidence to support it. The jury were forced to this inference, although there was no direct testimony to that effect, or else believed that a number of witnesses were guilty of deliberate perjury. *Richmond v. Poore*, 313.

9. *Interpretation by Counsel—Request for Construction by Court—Writing Required.*—If, pending argument of a case before the jury, counsel object to the interpretation placed by opposing counsel on an instruction which has been given, and requests an instruction from the court construing the language used, it is not unreasonable for the court to require the counsel making the objection to reduce to writing the qualifying or explaining instruction desired, and such is the usual and better practice. *Virginia Cedar Works v. Dalea*, 333.
10. *Invited Error.*—A party cannot object to an addition to an instruction in the same language as another instruction offered by him. He cannot invite an error and then be heard to complain of it. *City of Richmond v. Wood*, 75.
11. *Jury Fully Instructed.*—It is not error to refuse an instruction on a matter which has been fully covered by other instructions already given. *Norfolk & P. Co. v. Forrest*, 658.
12. *Jury Fully Instructed—Defective Instruction.*—Instructions are to be read as a whole, and if, when so read, it is seen that the law applicable to the case was fully propounded and without prejudice to the defendant, a verdict in favor of the plaintiff will not be set aside because some of the instructions did not fully propound the law. *City of Richmond v. Wood*, 75.
13. *Jury Fully Instructed.*—It is not error to refuse further instructions when the instructions already given fully and fairly submit the case to the jury on the phases sought to be presented. *Amer. Locomotive Co. v. Whitlock*, 238.
14. *Jury Fully Instructed.*—It is not error to refuse further instructions when the instructions already given fairly and fully submit the case to the jury in all essential particulars. *Washington So. Ry. v. Cheshire*, 741.
15. *Partial View of the Evidence.*—An instruction which directs a finding for the plaintiff upon a hypothetical case stated therein is erroneous if it leaves out of view all of the evidence tending to prove a state of facts upon which there is no liability upon the defendant. *Amer. Locomotive Co. v. Whitlock*, 238.

16. *Partial View of Evidence*.—An instruction should not be given which calls the attention of the jury to one question specifically, with but little reference to other questions involved in the case, as it tends to impress unduly on the jury that question and the facts bearing upon it, to the disadvantage of the other evidence in the case bearing upon the issue to be determined. *Lambert v. Phillips*, 632.

See APPEAL AND ERROR, 9, 10, 11; CORPORATIONS, 5; NEGLIGENCE, 2, 3.

### INSURANCE.

1. *Evidence Required to Prove Suicide*.—The defense of suicide to an action on a life insurance policy, in order to avail, must be established by evidence which excludes every hypothesis of accidental death. The burden of proof on that issue is on the defendant company. *Metropolitan Life Ins. Co. v. DeVault*, 392.
2. *Verdict Sustained by Evidence—Life Insurance—False Representations—Suicide*.—Whether, in the case at bar, the representations made by the assured in his applications for the policy in suit were material and false, and whether the assured came to his death by suicide were questions of fact for the determination of the jury, who were properly instructed upon the law of the case. The burden of proof on these questions was on the defendant company and as the evidence fully sustains the verdict of the jury in favor of the plaintiff on both questions it cannot be set aside on a writ of error. *Metropolitan Life Ins. Co. v. DeVault*, 392.

See APPEAL AND ERROR, 22.

INTERSTATE COMMERCE. See CARRIERS, 5; CONSTITUTIONAL LAW, 3.

### INTOXICATING LIQUORS.

1. *Breweries—Shipments to No-License Territory—Private Consumers*.—Under the act of assembly approved March 12, 1908 (Acts 1908; p. 275), commonly known as the "Byrd Law," a manufacturer of malt liquors, whether such manufactory be situated in "licensed" or "no-license" territory, has no right to sell his product, to be delivered to a common carrier to be transported to a place where it cannot be legally sold. The private consumer living in "no-licence" territory may buy in small quantities for personal use, but those engaged in the illegal sale of liquor cannot buy in large quantities from the manufacturers or wholesale dealers and use the common carriers as their aiders and abettors in their violation of the law. The general purpose of the law is to restrain and regulate the

sale of liquor and, in furtherance of that purpose, to protect "no-license" territory from illegal traffic in liquor. *Brewing Co. v. So. Express Co.*, 22.

2. *Social Clubs—Exemption From Municipal Taxation—Power of Legislature to Exempt—Intoxicating Liquors—Licenses—Section 1042 of Code.*—The act of March 12, 1904 (Acts 1904, p. 214), granting to corporations organized and conducted as *bona fide* social clubs exemption from all taxation, State, municipal and county, except the license fee to the State required by said act is a valid exercise of the police power of the State, although it may abridge the police power of the subordinate divisions of the State. It is not special legislation within the meaning of the Constitution, as it is a general law applicable to the whole State; and, in so far as it conflicts with section 1042 of the Code, it must prevail as it was enacted subsequently to that section. The power of the legislature to enact laws on any and all subjects is unrestrained, unless prohibited by the Constitution and it may say what a city shall, and what it shall not, tax notwithstanding section 1042 of the Code. Under the express terms of said act, a city has no right to impose a license or tax on a *bona fide* social club organized under the act, and which has complied with its provision. *Norfolk v. Board of Trade*, 353.

See CRIMINAL LAW, 2, 18, 19, 20, 21, 22, 23, 24; ELECTIONS, 1.

ISSUE. See PLEADING, 16.

JOINT TORT FEASORS. See APPEAL AND ERROR, 12; NEGLIGENCE, 4.

JUDGMENTS. See APPEAL AND ERROR, 6; EMINENT DOMAIN, 2; ESTOPPEL, 2.

JUDICIAL NOTICE. See CONFLICT OF LAWS, 2; EVIDENCE, 7.

JUDICIAL SALES.

1. *Upset Bids—Refusal to Accept.*—Where a judicial sale has been fairly made, at a good price, and there is no suggestion of any misconduct or impropriety in connection with the sale on the part of anyone, it should not be set aside merely because an upset bid of ten *per cent.* advance is offered, and the auctioneer is of opinion that the property will bring considerably more on a resale. To set aside such a sale would not inspire confidence in the stability of judicial sales, but would tend to deter and discourage bidders. *Howell v. Marien*, 200.

JURY. See TRIAL, 1.

JUSTICE OF THE PEACE. See ATTACHMENTS, 1.

LACHES. See RESCISSION, 1.

LAST CLEAR CHANCE. See NEGLIGENCE, 3; RAILROADS, 14; STREET RAILWAYS, 1.

LICENSE. See MUNICIPAL CORPORATIONS, 11, 12.

LIFE ESTATE. See FEE-SIMPLE, 1; WILLS, 6.

LIMITATION OF ACTIONS. See CARRIERS, 14, 15; TAXATION, 6.

LOCAL OPTION.

1. *Constitutional Law—Statutes—Operation—Subsequent Approval—Local Option Laws.*—When not restrained by the Constitution, in express terms or by necessary implication, the legislature has the power to make the operation of a statute dependent upon a vote of the people thereafter to be taken. In this State there is no constitutional inhibition on the power of the legislature to pass local option laws. *Willis v. Kalmbach*, 475.

See ELECTIONS, 1.

MALICE. See CRIMINAL LAW, 17.

MALT LIQUORS. See CRIMINAL LAW, 2, 19, 20.

MANCHESTER AND RICHMOND FREE BRIDGE CO. See CORPORATIONS, 7.

MANDAMUS.

1. *Function of Writ—Adequate Remedy.*—Mandamus will not lie in favor of a party who has another clear and adequate legal remedy, but the "adequate remedy" which will bar mandamus must be such as reaches the end intended, and actually compels the performance of the duty in question. It must be equally as convenient, beneficial and effective as the proceeding by mandamus. The function of the writ of mandamus is to enforce the performance of duties growing out of public relations, or imposed by statute, or in some respect involving a trust or official duty. *C. C. & O. R. Co. v. Scott County*, 34.
2. *Parties—Telephone Companies.*—Even if a court has jurisdiction by mandamus to compel two telephone companies to interchange business, it cannot and will not undertake to exercise such jurisdiction in a proceeding to which one of them is not a party. *Ivanhoe Fur. Co. v. Va. & Tenn. Tel. Co.*, 130.

See APPEAL AND ERROR, 13; RAILROADS, 1; TELEGRAPHS AND TELEPHONES, 1.

**MANSLAUGHTER.** See CRIMINAL LAW, 17.

**MARRIED WOMEN.** See ACKNOWLEDGMENTS.

**MASTER AND SERVANT.**

1. *Defective Appliance—Knowledge of Defects—Declaration—Sufficiency.*—Where a recovery is sought by a servant against his master for an injury inflicted by an appliance which is alleged to have been in a defective condition, it must be alleged and proved not only that the appliance was out of repair and that the defect was the proximate cause of the injury, but that the master knew, or ought, in the exercise of ordinary care, to have known, of its defective condition. A declaration in such a case which fails to make this allegation is bad on demurrer. Wherever every allegation of fact in a declaration may be true and yet the defendant not liable to the plaintiff for the cause of action stated, the declaration is bad. *Washington, &c. Ry. Co. v. Taylor*, 737.
2. *Employment by Servant—Assistants—Authority—Negligence.*—A master is liable for the negligence of a person employed by his servant in the prosecution of the master's business, or of a person who assists his servant at his request, provided the servant had express or implied authority to procure assistance, and the negligent act complained of was done within the scope of the employment. *Board of Trade Co. v. Cralle*, 246.
3. *Notice of Obvious Dangers—Risk of Employment.*—The law does not make it the duty of a master to warn a servant of an open and obvious danger of which he knows, or could have known by the exercise of ordinary care. Such dangers are risks incident to the employment. *American Locomotive Co. v. Whitlock*, 238.
4. *Railroads—Duty to Employees—Apprehended Dangers—Signals—Failure to Observe.*—It is the duty of a railroad company to use reasonable care to give to employees operating its trains proper warnings of the dangers which threaten them. If that is done it has discharged its duty, and if, from any cause, the signal is not observed, it is no fault of the railroad company, and it is not liable for resulting injuries. *New York, &c. R. Co. v. Wilson*, 754.
5. *Railroads—Negligence of Servant.*—A railroad company is under no greater obligation to care for the safety of one of its servants than he is to care for himself, and, generally, any negligence on the part of a servant amounting to the want of or-



dinary care, which is the proximate cause of his injury, will bar a recovery against the company. *Ches. & O. R. Co. v. Hoffman*, 44.

6. *Railroads—Operation of Switch at Roundhouse—Fellow-Servant Rule—Provision of Constitution and Statute.*—A servant whose duty it is to turn a turntable of a railroad for all engines coming in and going out of a roundhouse, and to throw the switch for the tracks in whichever way they are going, is engaged in the "physical operation of a switch" within the meaning of the Constitution and statute abolishing the fellow-servant rule and qualifying the doctrine of assumed risk as to such an employee of a railroad company. *Washington So. Ry. v. Cheshire*, 741.
7. *Railroads—Operating Turntable in Only Known Way—Instructions.*—In an action by a servant against his master to recover for injuries received in the operation of a turntable, an instruction is erroneous which tells the jury that the plaintiff cannot recover if they believe that his injuries were due to the manner in which he attempted to operate the table, when it is manifest from the evidence that he acted under the orders and by the instruction of his superior, and managed the table in the only way known to him. *Washington So. Ry. v. Cheshire*, 741.
8. *Railroads—Safe Track—Independent Contractors—Master and Servant.*—A railroad company is liable for the death of one of its employees occasioned by the negligent obstruction of its road-bed by an independent contractor employed to double-track its road. The duty to keep its track in a reasonably safe condition is non-assignable, and it cannot escape liability for the neglect of duties imposed upon it by law, in the interest of the safety of its servants and the public, by delegation to an independent contractor, or otherwise. *Walton, Witten & Graham v. Miller*, 210.
9. *Railroads—Structures—Constitutional Law.*—An employee engaged in the restoration of a pier which is a part of the road-bed or track of a railroad—removing rotten timbers and substituting those that are sound—is within the terms of section 162 of the Constitution applicable to persons "engaged in the physical construction, repair or maintenance of the company's roadway, track, or any of the structures connected therewith." *Ches. & O. R. Co. v. Hoffman*, 44.
10. *Risk in Doing Work—Reasonable Care of Servant.*—Although a servant may know that there is danger in doing the work assigned him in a particular way, yet if the danger was not so imminent that a reasonably prudent man would not have attempted it under the direction of his foreman, and the servant used such reasonable care as an ordinarily prudent man would

have exercised, and was injured, then the master is liable. *Washington So. Ry. v. Cheshire*, 741.

11. *Safe Place—Repairing Unsafe Structures.*—The rule that the master is to furnish the servant a reasonably safe place in which to work does not apply to a servant employed to repair an unsafe structure. The very object of the employment is to render secure that which has become unsafe. *Ches. & O. R. Co. v. Hoffman*, 44.
12. *Safer Way of Doing Work—Duty of Master and Servant, Respectively.*—Where there are two ways to perform work, the one safe and the other not, it is the duty of a servant to adopt the safe way, if he knows of it, or, by the exercise of ordinary care, might know it. It is also the duty of the master to inform the servant of the safe way, and if he was not informed of it and did not know it, and could not have ascertained it by the exercise of ordinary care, and was injured in consequence of doing the work in the only way known to him, and that manner of doing it was not so obviously dangerous that a reasonably prudent man would not have undertaken it, the master is liable. *Washington So. Ry. v. Cheshire*, 741.
13. *Street Railways—Injury of Conductor—Contributory Negligence—Ordinary Care—Measure of Duty.*—Negligence consists of the failure, under the circumstances, to exercise ordinary care, and the only difference between negligence of a plaintiff and of a defendant is that the former is called contributory negligence. To declare that if a street car conductor could have performed his duties and still have avoided the injury of which he complains he cannot recover is to require of him a higher degree of care than the law imposes. Perfection of attention to surroundings, while the mind is concentrated on a particular duty, is not required. The law only requires the exercise of reasonable or ordinary care—such care as reasonably prudent men would exercise for their safety under like circumstances. *Smith v. Norfolk & P. Co.*, 453.
14. *Street Railways—Personal Injury to Servant—Notice of Danger—Knowledge—Question for Jury.*—The fact that a conductor of a street car, who was killed by being struck by a freight car standing on a siding of the company in close proximity to the main line, had passed this car before the accident, did not charge him with knowledge of its dangerous proximity to the main line. Mere knowledge that a freight was sometimes on the track at that point did not charge him with knowledge of its dangerous proximity. Whether he knew of such proximity was a question of fact for the jury. He could not be held to know it as a matter of law, and an instruction so declaring is erroneous. In order to charge a servant with notice of a defect

and danger, it must be unquestionably clear and plain, so that if he did not see it, he must necessarily have been in fault. *Smith v. Norfolk & P. Co.*, 453.

15. *Who is Not a Servant—Employment by a Servant—Passenger Elevators.*—The owner of a passenger elevator is not responsible for an injury inflicted on a passenger by the negligence of an operator not employed, directly or indirectly, by the owner, but who was merely requested to operate the elevator for that trip by an "office boy" of the owner who had no power or authority, express or implied, to employ a servant for the owner. A master is liable for an injury inflicted on a third person by the acts or omissions of his servants while acting within the scope of their employment and in furtherance of it, but he is not liable as master where he does not occupy the relation of employer to the person whose negligence occasioned the injury. *Board of Trade Co. v. Cralle*, 246.

See CARRIERS, 9; PLEADING, 8; RAILROADS, 11.

MERGER. See DEEDS, 1.

MISREPRESENTATIONS. See FRAUD, 3.

MISTAKE. See APPEAL AND ERROR, 6; BANKS AND BANKING, 1, 2; CONTRACTS, 8; ELECTIONS, 2; REFORMATION OF INSTRUMENTS, 1; VENDOR AND PURCHASER, 3, 7.

MORTGAGES. See SALES, 4.

MOVABLE PROPERTY. See SALES, 3.

MULTIFARIOUSNESS. See EQUITY, 5.

MUNICIPAL CORPORATIONS.

1. *Amendment of Charters—Constitutional Law.*—It is within the power of the legislature to amend the charter of a municipal corporation, if it pursues the mode provided in article IV of the Constitution, and the special act is passed by a recorded vote of two-thirds of the members elected to each house, as provided by section 117 of the Constitution. *Miller v. Pulaski*, 137.
2. *Contracts—Awards—Engineer's Estimates—Usage of Trade.*—Although a contract with a city provides that the city engineer shall decide all questions, difficulties and disputes growing out of the contract, and that his estimates and decisions shall be final and conclusive upon the parties thereto, he cannot violate the provisions of the contract nor ignore the meaning attached

by trade usage to words or expressions used in the contract, and which are made a part thereof by operation of law. *Richmond v. Barry*, 274.

3. *Defective Highways—New Territory—Time to Repair Streets—Negligence.*—A municipal corporation is only liable for injuries resulting from defects in its streets when it has negligently failed to do that which it could reasonably be required to do under the circumstances of the particular case. If new territory be annexed to a municipality, a reasonable time must be allowed within which to put the streets and sidewalks of the new territory in a reasonably safe condition for travel, considering the subject in its entirety, and having reference to surveying, platting, grading, lighting and other things necessary to be done, and until such time has elapsed the municipality is not chargeable with negligence in that respect. What constitutes reasonable time is a question to be determined by the jury upon the evidence and proper instructions as to the law bearing thereon. *Richmond v. Mason*, 546.
4. *Defective Sidewalks—Constructive Notice—Evidence—Failure to Call Important Witness.*—It will not be presumed that the officers of a city charged with the duty of observing and reporting defects in city sidewalks neglected their duty from the fact that a patrolman on the beat where an accident occurred, and who was still in the employment of the city, was permitted to go beyond the jurisdiction of the court without testifying. When constructive notice of a defect in a city sidewalk is relied on, it is necessary to allege and prove by a preponderance of evidence the facts from which the notice may be reasonably presumed. *Portsmouth v. Houseman*, 554.
5. *Defective Streets—Constructive Notice—Repairs—Reasonable Time.*—A city is not an insurer of the safety of persons passing along its streets and sidewalks. It cannot be held liable in damages for an injury resulting from a defect in one of its streets or sidewalks unless it is shown that it was negligent in not repairing such defect within a reasonable time after it knew or should have known of such defect; and what is a reasonable time is a mixed question of law and fact. It is not an arbitrary right of the jury to say what is such reasonable time, but this question is to be determined from the evidence under proper instructions from the court. In the absence of all evidence of actual notice, it cannot be said that because a lid over a catch basin which had slipped eight or nine inches had so remained from twelve o'clock in the day till nine o'clock at night was sufficient to give the city constructive notice of the defect. *Portsmouth v. Houseman*, 554.
6. *Safe Premises—Fall of Awning Over City Street—Liability of Owner—Independent Contractor.*—An owner of property who

erects an awning over a city sidewalk is bound to exercise ordinary care to see that it is so secured and managed as to be able to withstand not only the ordinary vicissitudes of the weather, but the force of winds which experience has shown to be liable to occur in that locality. The fact that it was erected by an independent contractor is immaterial if it had been delivered to, and accepted by the owner. *McCrorey v. Thomas*, 373.

7. *Inadequate Sewer—Extraordinary Flood.*—An extraordinary flood which will excuse a city for an overflow of its sewers must be such as could not reasonably have been expected in that locality. *City of Richmond v. Wood*, 75.
8. *Obstructed Sewer—Extraordinary Storm.*—If by the want of ordinary care a city sewer becomes choked, and a plaintiff is damaged as a result thereof, the city is liable for such damages: so, likewise, if a culvert becomes choked because of the want of ordinary care on the part of the city, and the condition of the culvert is the real and proximate cause of the injury to the plaintiff's property, the fact that there was an extraordinary flood at the time will not relieve the city from liability. *City of Richmond v. Wood*, 75.
9. *Overflowing Sewers—Evidence—Other Overflows—Complaints.*—In an action to recover damages resulting from the overflow of a city sewer on a given date, other overflows in the city on that date may be shown in order to prove that the rain storm on that day was extraordinary, but it is not permissible to show whether there were many complaints of overflows. Facts, not complaints, are admissible. Those who complained should be brought to prove the facts upon which the complaints rested. *City of Richmond v. Wood*, 75.
10. *Control of Streets—Construction of Grant.*—The grant by the legislature of municipal control over streets must be strictly construed in the interest of common right. *White Oak Coal Co. v. Manchester*, 749.
11. *Streets—License Tax on Vehicles—Non-Residents—Use of Streets—City of Manchester—Case at Bar.*—The sporadic act of hauling a single consignment of coal by a non-resident coal company from a railroad siding in the city of Manchester, over the streets of the city, to a customer outside, is not carrying on such a business or occupation within the city as would subject the coal company to the license tax on vehicles imposed by the ordinance of the city. *White Oak Coal Co. v. Manchester*, 749.
12. *Streets—License Tax on Vehicles—Rights of Non-Residents.*—It is a reasonable exercise of charter powers to license vehicles for a municipality to lay a license tax upon vehicles of residents thereof and upon persons residing outside of the corporate

limits who employ their vehicles in furtherance of business and occupations carried on within the municipality, but to levy such tax on vehicles of non-residents, whose business or pleasure casually carries them into or through the municipality, would be in derogation of their reserved right to use the highways of the Commonwealth, and impose intolerable conditions upon the public, and lead to absurd results. *White Oak Coal Co. v. Manchester*, 749.

13. *Streets and Sidewalks—Reasonably Safe Condition.*—A municipal corporation is not an insurer against all defects and obstructions in its highways, but is bound to use due and proper care to see that its streets and sidewalks are reasonably safe for persons exercising ordinary care and prudence. It is not required to have its streets and sidewalks so constructed as to secure absolute immunity from danger in using them, nor is it bound to employ the utmost care and exertion to that end. *Richmond v. Mason*, 546.

See CONTRACTS, 3, 4; EMINENT DOMAIN, 3, 8; NEGLIGENCE, 6; NUISANCE, 1; RAILROADS, 8.

**MURDER.** See CRIMINAL LAW, 6, 15, 16, 17.

## NEGLIGENCE.

1. *Contributory Negligence—Case at Bar.*—Without reference to the rule which obtains on a demurrer to the evidence, a jury would have been well warranted in finding from the whole evidence in the case at bar that the plaintiff's intestate was not guilty of contributory negligence barring a recovery. *Norfolk & W. R. Co. v. Holmes*, 407.
2. *Instructions—Safe Methods—Selections of Safer—Case at Bar.*—The instructions in the case at bar do not impose upon the defendant the duty of using the safer of two reasonably safe ways of managing an appliance, but of using a safe instead of an unsafe method under existing conditions. *McCrorey v. Thomas*, 373.
3. *Last Clear Chance—Instructions.*—An instruction dealing with the duty of the defendant under the doctrine of the "last clear chance" is not bad for failing to state the corresponding duty of the plaintiff where this has been fully and fairly done by other instructions given in the case at the instance of the defendant. *Norfolk & P. Co. v. Forrest*, 658.
4. *Parties—Joint Tort Feasors.*—When the negligence of two or more persons concurs in producing a single indivisible injury, then such persons are jointly and severally liable, although

there was no common duty, common design, or concert of action. In the case at bar, the declaration alleges that the negligence and lack of ordinary care of an independent contractor and of a railroad company were the efficient and proximate cause of the death of the plaintiff's intestate, and this is sufficient to warrant their joinder as defendants in an action for his death, when the details of the negligence are specified. *Walton, Witten & Graham v. Miller*, 210.

5. *Pleading—Declaration—Negligence—How Charged.*—It is not sufficient for a declaration to allege negligence in a general way (for to do so is only to state the pleader's conclusions of law from undisclosed facts), but it must aver the act of negligence relied on with reasonable certainty, and show that such act constitutes the efficient and proximate cause of the injury. Otherwise, no traversable issue is tendered, and the court cannot determine, as a matter of law, whether the declaration states a case of actionable negligence, and the defendant is not informed of the case he is called upon to defend. All that is required is that the declaration shall contain a concise statement of the material facts on which a recovery is demanded, and not bare conclusions from undisclosed facts. The evidence, of course, need not be pleaded, but the facts relied on as furnishing a cause of action should be sufficiently set forth to apprise the defendant of the ground of complaint. *Ches. & O. R. Co. v. Hunter*, 341.
6. *Presumption—Fall of Awning in City Street.*—Negligence is never presumed from the mere fact of injury, but an injury may occur under such circumstances as will warrant an inference or presumption of negligence. If a pedestrian traveling along a city sidewalk is injured by the fall of an awning attached to a building (and no issue is raised as to the awning being a nuisance) there is a presumption of negligence on the part of the owner or occupier of the house, and the burden is upon him to disprove the existence of negligence by evidence that, as a matter of fact, all proper and reasonable care had been taken. *McCrorey v. Thomas*, 373.
7. *Self-Imposed Emergency.*—The rule that a person confronted by a sudden emergency or peril is not required to exercise the degree of care required of prudent persons under ordinary circumstances is not applicable where the emergency is self-imposed. *Ches. & O. R. Co. v. Hall*, 296.
8. *Sudden Peril.*—One who is placed in a position of sudden peril by the negligence of another, without contributory negligence on his part, is not liable for errors of judgment in endeavoring to escape the peril. *Walton, Witten & Graham v. Miller*, 210.

See BANKS AND BANKING, 3, 4; CARRIERS, 6, 7, 8; DEMURBER TO EVIDENCE, 5; INDEPENDENT CONTRACTOR, 1; MASTER AND SERVANT, 1, 2, 4, 5, 7, 13; MUNICIPAL CORPORATIONS, 3, 4, 5, 6, 13; PLEADING, 6, 7, 8, 9; RAILROADS, 4, 5, 6, 8, 11, 12, 14; STREET RAILWAYS, 1, 2, 3, 4, 5, 6.

## NEGOTIABLE INSTRUMENTS.

1. *Holder for Value—Agent to Collect.*—Where a bank, in answer to a garnishment sued out by the drawee of a draft against the drawers thereof, states that it is not indebted to the drawers but holds the fund for a bank in another State, which was the payee of the draft, and forwarded it to the garnishee for collection, the facts that the non-resident bank employed no counsel to defend the suit, to which it was not a party, and stamped on the bill of lading attached to the draft that it was not responsible for the quantity, quality or delivery of the goods, and endorsed the draft without recourse, and that the drawers waived protest and notice, and that the draft which had been once returned was afterwards forwarded, with a pencil memorandum attached bearing the initials of the drawers: "Please send back and present again," are not inconsistent with the payee's *bona fide* ownership of the draft, and do not overcome the legal presumption that it is a holder for value, and not a mere agent for collection. *Lynchburg Milling Co. v. Bank*, 639.
2. *Holder for Value—Presumption.*—In a contest between the payee of a bill of exchange and the drawer thereof, or a creditor of the drawer, over the proceeds of the draft, the payee, by the very terms of the Negotiable Instruments Act, is presumed *prima facie* to be a holder for value, and the burden is on the party denying it to prove the contrary. *Lynchburg Milling Co. v. Bank*, 639.

NEGROES. See COVENANTS, 1.

## NEW TRIAL.

1. *After Discovered Evidence—Cumulative and Corroborative.*—The verdict of the jury will not be set aside on the ground of after discovered evidence, where such evidence is merely cumulative and corroborative of what was proved on the trial, or is immaterial. *Richmond v. Poore*, 313.
2. *After Discovered Evidence—Requisites.*—In order to warrant a new trial for after discovered evidence, the evidence must have been discovered since the trial. It must be evidence that could not have been discovered before the trial by the exercise of reasonable diligence. It must be material in its object and



such as ought, on another trial, to produce an opposite result on the merits. It must not be merely cumulative, corroborative or collateral. *Virginia Cedar Works v. Dalea*, 333.

3. *Improper Evidence—Harmless Error.*—The verdict of a jury should not be set aside for the improper reception of evidence, where, as in this case, the court can see that such evidence could not have prejudiced or influenced the minds of the jury. *Ches. & O. R. Co. v. Hoffman*, 44.
4. *Allegation and Proof—Case at Bar.*—The evidence in the case at bar, viewed from the standpoint of a demurrer to the evidence, establishes the allegation of the declaration that the proximate cause of the plaintiff's injury was the failure of the defendant to provide a sufficient number of competent servants to do the work required. *Virginia Cedar Works v. Dalea*, 333.

See APPEAL AND ERROR, 20.

NON-RESIDENTS. See MUNICIPAL CORPORATIONS, 11, 12.

NOTICE. See MUNICIPAL CORPORATIONS, 4, 5; VENDOR AND PURCHASER, 5.

#### NUISANCE.

1. *Obstructing City Street—Overhanging Awning.*—The unauthorized obstruction of a city street by anything upon, above or below the surface is a nuisance, and, unless justified by legislative authority, the owner of an awning erected and maintained over a public street, becomes, as to persons lawfully using the street, an insurer. He maintains the same at his own peril, and anyone receiving an injury from such awning, being himself free from blame, has a good cause of action against the owner thereof, regardless of the question of his negligence in the construction and maintenance of such awning. *McCrorey v. Garrett*, 645.

See COUNTIES, 1; EMINENT DOMAIN, 1, 3; NEGLIGENCE, 1.

OPINIONS. See WITNESSES, 7, 8.

OPTIONS. See FRAUD, 6.

ORDINANCES. See EVIDENCE, 7; RAILROADS, 8.

OVERFLOWS. See MUNICIPAL CORPORATIONS, 7, 8, 9.

#### OYSTERS.

1. *Application for Grounds—Priority of Claims.*—The writ of mandamus prayed for in the case at bar, to compel the oyster in-

spector to take the necessary preliminary steps to assign certain oyster grounds to the petitioner, was properly refused, as there were pending before the inspector prior *bona fide* applications for the same grounds which had not been acted on through no fault of the applicants. The prior applications were before the re-establishment of the lines of the Baylor survey, but were still insisted on, while petitioner's application was not filed till after such re-establishment. *Hundley v. Neale*, 612.

2. *Baylor Survey—Re-Established Lines.*—The Baylor survey and report of oyster beds, etc., and the Edmonds-Baker survey re-establishing a line or lines of the Baylor survey are each, in pursuance of legislative enactments, conclusive evidence in all the courts of the Commonwealth that the grounds within the limits of such survey and report are natural oyster beds, rocks or shoals, and that there are no natural oyster beds, rocks and shoals lying within the waters of the counties wherein such report and survey are filed other than those embraced in the survey. *Commission v. Hampton Roads Oyster Co.*, 565.
3. *Inspectors—Acts Ultra Vires.*—An oyster inspector is but an agent of the State to perform the duties delegated to him by statute, and all persons dealing with him are presumed to know the law, and must take notice of the extent of his authority. The State is not bound by his acts *ultra vires*. *Commission v. Hampton Roads Oyster Co.*, 565.
4. *Public Grounds—Leases—Ultra Vires Acts of Inspector.*—The public oyster grounds of this State are held in trust for the use and benefit of all the citizens of the State, and no person can, by lease or otherwise, acquire the right to use them for any purpose. The statute by which the State guarantees to the lessee of oyster grounds who pays his rent annually in advance the right to continue to use and occupy the same for twenty years, only applies where the lease is made of oyster planting grounds authorized by statute to be leased to planters, and not where the acts of the oyster inspector in making a lease were *ultra vires*. *Commission v. Hampton Roads Oyster Co.*, 565.
5. *Surveys of Public Grounds—Conclusive Effect—Power of Legislature.*—The natural oyster beds, rocks and shoals in the bays and rivers of this State are held in trust for the benefit of the people of this State by virtue of constitutional provisions and numerous acts of assembly, and the General Assembly is vested, by the Constitution, with authority, from time to time, to define and determine such natural beds, rocks or shoals by surveys or otherwise and has the power to declare that such surveys, made under its direction, shall be conclusive on all the courts of the Commonwealth. *Commission v. Hampton Roads Oyster Co.*, 565.

PAROL EVIDENCE. See EVIDENCE, 6, 10.

PARTICULARS. See BILL OF PARTICULARS; DAMAGES, 3.

PARTIES. See EMINENT DOMAIN, 2; MANDAMUS, 2; PRINCIPAL AND AGENT, 2; TRUSTS AND TRUSTEES, 2.

PARTY WALLS. See BOUNDARIES, 1.

PASSENGERS. See CARRIERS, 6, 7, 8.

PAYMENT. See BANKS AND BANKING, 1, 2.

PAYMENT INTO COURT. See EMINENT DOMAIN, 4.

PENALTY. See FORFEITURES, 1, 2.

PERSONAL INJURY. See DAMAGES, 2, 4.

PERSONAL PROPERTY. See FIXTURES, 2; SALES, 2.

#### PLEADING.

1. *Assumpsit—Payments for Land—Failure of Consideration.*—A count in a declaration in assumpsit to recover payments made on the purchase price of a tract of land that avers a state of facts which, if true, shows that the plaintiff never received anything under the contract of sale, and that the defendant cannot convey what he contracted to convey, sufficiently avers a substantial, if not a total failure of consideration, and is a good count. *Riverside Co. v. Husted*, 688.
2. *Bill of Particulars—Failure to Furnish—Code, Section 3294.*—If a defendant in an action of trespass on the case who has pleaded the general issue of "not guilty" fails to comply with an order requiring him to specify his grounds of defense, he should not be allowed to introduce any evidence controverting the plaintiff's claim, as his plea gives no notice thereof. The object of section 3249 of the Code is to give the adverse party full notice of the character of the plaintiff's claim, or the defendant's defense. *Colby v. Reams*, 308.
3. *Declaration—Matters of Evidence.*—In an action to recover injuries received while engaged in work involving many details, the details of the method employed by the defendant may properly be the subject of proof, although not specifically stated in the declaration. The object of the declaration is not to set out all the facts and circumstances which are to be disclosed in the evidence, but merely to give to the defendant such reason-

able information of the ground of complaint as will enable him fairly to present his grounds of defense. *Ches. & O. R. Co. v. Hoffman*, 44.

4. *Declaration—Several Counts—Demurrer to Declaration and to Each Count—Defective Counts Ignored—Appeal and Error.*—Generally if a declaration in tort contains more than one count, some of which are good and others bad, and there is a demurrer to the whole declaration and each count thereof, it should be sustained as to the bad counts, else a general verdict and judgment for the plaintiff will, as a rule, be set aside, as the verdict may have been founded on the faulty count. But where the court is satisfied that the defendant has not been prejudiced by the faulty count, the verdict ought not, for that cause only, to be set aside. So where it is manifest that the trial was had on a particular count and that is good, the appellate court will not concern itself with the insufficiency of other counts. *Virginia Cedar Works v. Dalea*, 333.
5. *Declaration—Sufficiency.*—A declaration is sufficient if it apprises the defendant of the ground of complaint, and states sufficient facts to enable the court to say upon demurrer that the plaintiff is entitled to recover if the facts stated are proved. *Ches. & O. R. Co. v. Hoffman*, 44.
6. *Declaration Charging Negligence—Case or Trespass—Street Railways.*—A count in a declaration which simply charges that a street railway company negligently ran its car into the plaintiff's wagon, causing the injury complained of, without saying wherein the negligence consisted, is not a good count, either in case or trespass. In either case the acts of negligence relied on as a basis of recovery must be stated. The declaration must state sufficient facts to enable the court to say, upon a demurrer, whether, if the facts stated be proved, the plaintiff is entitled to recover. *Newport News, &c. R. Co. v. Nicolopoulos*, 165.
7. *Declaration in Tort—Sufficiency.*—It has never been the purpose of this court to introduce innovations in pleading in negligence cases, or to subject the plaintiff to unreasonable requirements in setting out the cause of his action. All that is necessary is for the pleader to set forth the facts which constitute the cause of action in such manner that they may be understood by the party who is to answer them, the jury who are to ascertain the truth of the allegations, and by the court which is to give judgment. *Virginia Cedar Works v. Dalea*, 333.
8. *Declaration in Tort—Sufficiency—Case at Bar.*—A count in tort which sets forth with a reasonable certainty the facts that show that the casualty complained of was proximately due to the defendant's negligence in ordering an inexperienced servant, of whose lack of skill it had knowledge, without instruction

and assistance, to operate a dangerous machine, which duty was ordinarily performed by a sawyer and helper, is sufficient. It connects the defendant's negligence with the injury complained of, and sufficiently warns the defendant of the case he is to meet. *Virginia Cedar Works v. Dalea*, 333.

9. *Declaration in Tort—Sufficiency—Negligence—Street Railways—Rights in Highway.*—In an action to recover damages resulting from a collision between a street car and a traveler driving a vehicle on a public highway, a count in a declaration which alleges excessive speed of the street car as the proximate cause of the injury sufficiently charges the negligence of the owner of the street car; and so likewise does a count which alleges the failure of the motorman to keep a lookout as the proximate cause of the injury. The owner of a street car has no interest in the highway along which it runs, but simply a right to use it in common with the public. Street cars are governed for the most part by the same rules applicable to other vehicles on the public highway, and their owners have only equal rights with the traveling public to its use. *Newport News, &c. R. Co. v. Nicolopoulos*, 165.
10. *Demurrer—Assignment of Special Causes—Several Breaches—Some Well Assigned—General Demurrer.*—The assignment of a special cause as ground of demurrer does not narrow the scope of the demurrer. Where a count contains several breaches any one of which is well assigned, this is sufficient to maintain the action, and a general demurrer to the count should be overruled. *Portsmouth Refining Co. v. Oliver R. Co.*, 513.
11. *Demurrer—Common Counts in Assumpsit.*—A demurrer to the common counts in assumpsit, in the usual form, should be overruled. *Portsmouth Refining Co. v. Oliver R. Co.*, 513.
12. *Demurrer—Count Good in Part.*—An objection which, if sustained, would not vitiate the whole count cannot be made by a general demurrer to the whole count. *Portsmouth Refining Co. v. Oliver R. Co.*, 513.
13. *Demurrer to One Count of Declaration—Improperly Overruling—Effect on Verdict for Plaintiff.*—If a demurrer to one count of a declaration containing several counts be improperly overruled, a verdict for the plaintiff must be set aside, unless the court can see that no prejudice did or could have resulted to the defendant from the error. *Newport News, &c. R. Co. v. Nicolopoulos*, 165.
14. *Demurrer—Questions of Evidence.*—Whether a written agreement can be introduced to sustain a recovery under the common counts in assumpsit must be determined when the evidence is offered. The question cannot be raised by a demurrer to said counts. *Portsmouth Refining Co. v. Oliver Refining Co.*, 513.

15. *Failure to Take Rules—Correction by Court—Code, Section 3293.*—On a motion to remand a case to rules because the clerk had not taken the rules maturing the case for hearing, it is not error for the trial court to overrule the motion, retain the case and require the clerk to enter the proper rules on the rule-book maturing the case for hearing; it appearing that the defendant was in no wise prejudiced by the failure of the clerk to take the rules at the proper time. Under the provisions of section 3293 of the Code, the court has control over all proceedings in the clerk's office during the preceding vacation. *South-ern Express Co. v. Jacobs*, 27.
16. *Trial Without Issue—Case at Bar—Estoppel.*—As a general rule, no judgment can be given upon a verdict rendered as upon the trial of an issue when no issue has been joined. Issue must first be joined on the pleadings. In the case at bar, no plea was filed. An order was made for the defendant to file a statement of his grounds of defense, but it was not complied with, and the trial proceeded as if issue had been joined. The plaintiff objected to the introduction of evidence by the defendant controverting his claim, but his objection was overruled. The plaintiff did all that he could to present the defect to the trial court, and hence is not estopped to rely upon the objection in this court. *Colby v. Reams*, 308.

See APPEAL AND ERROR, 2; ASSIGNMENTS; BILL OF PARTICULARS, 1; DAMAGES, 3, 5; NEGLIGENCE, 5; PRINCIPAL AND AGENT, 2; STREET RAILWAYS, 6.

POLL TAX. See ELECTIONS, 4, 5, 6.

PRESUMPTIONS. See CONSTITUTIONAL LAW, 7; MUNICIPAL CORPORATIONS, 4; NEGLIGENCE, 6.

#### PRINCIPAL AND AGENT.

1. *Contracts—Principal and Agent—To Whom is Credit Given—Independent Contractor.*—Whether an independent contractor, or the owner, or the lessee of a building is liable for materials furnished for an improvement of the building depends upon the question, to whom was credit given? Where an independent contractor is sued, the fact that he was an independent contractor is to be considered along with all the other facts and circumstances in determining to whom credit was given, but is not decisive of that question. *Lambert v. Phillips*, 632.
2. *Parties—Contracts by Agents—Sealed and Unsealed—Who May Sue.*—Where an agent is contracted with by deed in his own name, his principal cannot sue upon it. But where a contract

not under seal is made by an agent in his own name for an undisclosed principal, either the agent or the principal may sue upon it. *Portsmouth Refining Co. v. Oliver Refining Co.*, 513.

3. *To Whom is Credit Given—Presumption.*—If an agent makes full disclosure of his principal to one with whom he is dealing, the legal presumption is that credit is given to the principal and not to the agent, unless it further appears that credit was expressly and exclusively given to the agent. *Lambert v. Phillips*, 632.

See CORPORATIONS, 2.

PRIVATE USE. See EMINENT DOMAIN, 5.

#### PROCESS.

1. *Return—Signature of Officer.*—A return on a writ or process is the short official statement of the officer endorsed thereon of what he has done in obedience to the mandate of the writ, or why he has done nothing. The signature of the officer thereto is no part of the return, but is merely intended to authenticate it. *Slingsluff v. Collins*, 717.

See EXECUTIONS, 1, 2.

PROMOTERS. See CONTRACTS, 5; CORPORATIONS, 2, 3, 4, 5.

PROPERTY. See SALES, 3.

PROXIMATE CAUSE. See CARRIERS, 9; NEW TRIAL, 4; RAILROADS, 12; STREET RAILWAYS, 4.

PUBLIC USE. See EMINENT DOMAIN, 1, 3, 6, 7, 8.

PUNCTUATION. See STATUTES, 5.

PURCHASER. See VENDOR AND PURCHASER.

#### RAILROADS.

1. *Change of County Road—Consent of Supervisors—Mandamus.*—Before a railroad or other public service corporation can alter a county road, it must first obtain the consent of the board of supervisors of the county to the proposed alteration, and, upon proper application, it is the duty of the board, in advance of the construction of the proposed railroad, to consent or refuse to consent to the proposed change of route, leaving the matter

of construction, grade, etc., to be fixed upon and carried out afterwards. If application is made for such consent, and the board simply refuses to act, the proper remedy is mandamus to compel the board to take action by either giving or refusing its consent to the proposed alteration. This does not in any way interfere with the discretion of the board, but simply compels action generally. The board has no right to insist that the proposed new road shall be constructed before it will give or refuse consent to the proposed change. *C. C. & O. R. Co. v. Scott County*, 34.

**2. Contract for Right of Way—Recital—Contract to Construct.—**

A contract between a railroad company and a land owner for the purchase of a right of way, and which, by way of preamble and inducement, recites the purpose of the railroad company to build a road between two designated points, or sections, is not a contract or covenant on the part of the railroad company to build a railroad, but, if the land is sufficiently designated and the price fixed, is a valid and enforceable contract for the sale of the land described. The statute requires an effort to make such a contract before the company can condemn, which would be a useless ceremony if the contract, when made, could not be enforced. *Tidewater Railway Co. v. Hurt*, 210.

**3. Conveyance for Depot Purposes—Deeds—Conditions—Covenants.**

—A deed conveying land to a railroad company for "depot and other railway purposes" in consideration of the grantee's agreeing to erect and maintain a depot on the land conveyed, but containing no clause of forfeiture or right of re-entry for failure to do so, vests in the grantee a fee simple estate in the land conveyed, and the superadded words do not create a condition subsequent, but only an agreement or covenant on the part of the grantee to use the land for the purpose specified. The deed is founded upon a valuable consideration, and the language used is to be taken most strongly against the grantor. *Shreve v. Norfolk & W. R. Co.*, 706.

**4. General Contractors—Blasting Near Track—Duty to Employees of Railroad Company—**

General contractors engaged in blasting and excavating in close proximity to a railroad track in daily use owe to the employees of the railroad company the twofold duty of using ordinary care not to obstruct the track, and, in the event they do obstruct it, to use like care to warn such employees of the obstruction in time to enable them, by the exercise of ordinary care, to protect themselves from danger, and the failure to discharge either duty constitutes actionable negligence. *Walton, Witten & Graham v. Miller*, 210.

**5. Grade Crossing—Danger—Admissibility of Evidence—Contributory Negligence.—**

The dangerous character of the place at which



plaintiff's intestate was killed, and the right, in the absence of any city ordinance, to admit evidence that the defendant did not have a flagman or watchman at the gate, and whether the plaintiff's intestate was negligent in failing to look and see the train, were considered and decided in *Norfolk and W. R. Co. v. Holmes*, ante, p. 407; *Norfolk and W. R. Co. v. Munsell*, 417.

6. *Grade Crossing—Instructions—Fanciful Requirements—Partial View of Evidence.*—In an action against a railroad company for negligently killing a person at a grade crossing, an instruction which gives the conditions showing the unusual surroundings and dangerous conditions of the place, and tells the jury if they believe such conditions existed, the defendant was bound to use such precautions as were proper, under the peculiar surroundings and circumstances, in order to give warning of the approach of the train, does not authorize the jury to impose fanciful requirements upon the defendant. Nor is it objectionable as singling out and emphasizing one charge of negligence. If the conditions described existed, it was for the jury to say whether, in view of such conditions, the defendant was negligent. *Norfolk & W. R. Co. v. Munsell*, 417.
7. *Grade Crossing—Care Required.*—A railroad company is bound to exercise care to avoid a collision when its road crosses a public highway at grade, and the greater the danger the greater is the vigilance required. *Norfolk & W. R. Co. v. Holmes*, 407.
8. *Negligence—Running Engines Backwards—Signals—City Ordinance—When Needless to Allege or Prove.*—Whether or not it is negligence to operate a locomotive engine backwards with no one on the tender to signal its approach is generally a question of fact for the jury, though under some circumstances it is negligence as a matter of law. To operate an engine backwards, over a populous thoroughfare of a city, on a dark night, when it is "drizzly or misty," with no light burning, no bell ringing, preceded by no flagman, and without any watchman or warning of any kind to persons passing along said street is negligence, and if the allegations of the declaration are sufficient to warrant the introduction of such evidence, the same may be shown without reference to the existence, pleading or proof of a city ordinance requiring such precautions to be taken. *Norfolk & W. R. Co. v. Holmes*, 407.
9. *Negligence—Street Crossing—What Allegations and Proof of Negligence Sufficient.*—A declaration against a railroad company for running over and killing a person at a street crossing in a city is sufficient when, after particularly describing the *locus in quo*, it alleges it to be the duty of the company to exercise due and ordinary care to keep a watch and lookout to avoid injuring persons passing over said crossing, and to give warn-

ing of the approach of its trains by ringing a bell, or by taking other means of notification so as to avoid such inquiry, and the breach of the duty so alleged. The particular mode or precaution, to the exclusion of others, need not be alleged. Under such allegation and breach as is above stated, it is competent for the plaintiff to prove that there was no flagman, no watchman, no person riding on the front of the engine, that the engineer could not see from his cab, and that no light was burning and no bell ringing. *Norfolk & W. R. Co. v. Holmes*, 407.

10. *Negligent Fires—Burden of Proof—Presumption.*—In an action against a railroad company to recover damages for fire set out by its engines, the burden is on the plaintiff to show that the fire originated from sparks emitted by an engine of the defendant. This being shown, the company is presumptively charged with negligence, and it must assume the burden of proving that its engine was equipped with the best mechanical appliance in known and practical use for preventing the escape of sparks, that the engine was kept in proper condition and repair to prevent the undue emission of sparks, and was properly managed; and, if the fire began on the defendant's right of way, that it kept its right of way clear of combustible material liable to ignition by sparks or coals of fire discharged from passing engines, thereby communicating fire to the property of others. *Phillips v. Southern R. Co.*, 436.
11. *Obstructions on Track—Duty of Flagman.*—If an engineer of a locomotive engine on approaching a flagman gave the usual and ordinary signal in answer to the flag, and the flagman understood the signal as such answer, he had the right to presume that the engineer saw the flag and answered the warning and to discontinue the flagging, and this would bar a recovery for the engineer's death occasioned by not heeding the warning, although he did not see the flag or intend to answer it; but if the same signal was also used in response to communications from the conductor, and the flagman knew, or, by the exercise of ordinary care, ought to have known, that the signals given by the engineer were not in response to his flag, but to communications from the conductor, he was not justified in discontinuing flagging, and recovery is not barred. *Walton, Witten & Graham v. Miller*, 210.
12. *Personal Injury—Grade Crossing—Duty of Traveler—Failure to Give Signals—Contributory Negligence—Case at Bar.*—It is the duty of one about to cross a railroad at grade to make vigilant use of his eyes and ears to ascertain whether a train is approaching from either direction, and to make such use at a time when and place where looking and listening will be effec-

tive, and a failure to do so is, as a rule, such contributory negligence on his part as will bar recovery. The failure of the railroad company to give the statutory signal for the crossing is negligence, but does not excuse the performance of the traveler's reciprocal duties, and does not entitle the traveler to recover unless it was the sole proximate cause of the injury complained of. In the case at bar, the proximate cause of the death of the plaintiff's intestate was a thoughtless disregard of the obvious duty to look and listen before going upon defendant's track, and there can be no recovery. *Ches. & O. R. Co. v. Hall*, 296.

13. *Personal Injury—Grade Crossing—Failure to Give Signals—Other Warnings.*—The personal representative of one killed at a grade crossing of a railroad is not entitled to recover of the railroad company, although the statutory crossing signal was not given, if other warnings were given which in fact notified the deceased of the approach of the train, or would have notified him if he had been exercising ordinary care, so that he could have avoided the injury. *Ches. & O. R. Co. v. Hall*, 296.
14. *Persons Approaching Track—Presumption—Last Clear Chance.*—Trainmen who see persons approaching a crossing usually have the right to presume that they will not go on the track in front of a rapidly approaching train, and if they do so when it is too late to avoid injuring them, the doctrine of last clear chance has no application. *Ches. & O. R. Co. v. Hall*, 296.

See CARRIERS, 1, 6, 7, 8; CONSTITUTIONAL LAW, 2; CONTRACTS, 9; MASTER AND SERVANT, 4, 5, 6, 7, 8, 9; NEGLIGENCE, 1, 4; WITNESSES, 7, 8.

RATIFICATION. See FRAUD, 5, 7, 9.

REASONABLE DOUBT. See CRIMINAL LAW, 17.

#### REFORMATION OF INSTRUMENTS.

1. *Mutual Mistake—Proof Required.*—The burden of proof is on the complainant, and a very high degree of proof is required, in a suit to reform a written contract. A mere preponderance of the evidence is not sufficient, but the existence of the mutual mistake must be conclusively established. *Bidd v. American Coal Co.*, 261.

#### REMOVAL OF CAUSES.

1. *Removal of Case to Federal Court—Time for Filing Petition.*—A petition to remove a case from the State court to a Federal court must be filed on or before the rule-day on which a plea in abatement must be filed, else it will be too late; and under the

provisions of section 3260 of the Code, all pleas in abatement must be filed before there is a conditional judgment at rules. *So. Express Co. v. Jacobs*, 27.

**REPUGNANCY.** See WILLS, 1.

**RESCISSION.**

1. *Fraud—Laches—Case in Judgment.*—If a party intends to repudiate a contract on the ground of fraud, he should do so as soon as he discovers the fraud. If, after the discovery of the fraud, he treats the contract as a subsisting obligation, he will be deemed to have waived his right of repudiation. Prompt action is essential when one believes himself entitled to a rescission of a contract. In the case in judgment, the appellee, with full knowledge of all the facts, acquiesced in his contract and enjoyed its benefits for years with no intimation that he had been deceived or defrauded, and hence cannot now have the same rescinded. *Finch v. Garrett*, 114.
2. *Fraud—Ultra Vires Contract.*—In a suit against a corporation to rescind a contract on the ground of fraud in its procurement, if a proper case for rescission be made out, the fact that the contract is *ultra vires* and not enforceable is immaterial. *Baker v. Berry Hill Co.*, 776.

**RES JUDICATA.** See APPEAL AND ERROR, 3; ESTOPPEL, 2; STARE DECISIS, 1.

**RETURNS.** See EXECUTIONS, 1, 2; PROCESS, 1.

**ROADS.** See ELECTIONS, 2.

**RULES AND RULE DAYS.** See PLEADING, 15; REMOVAL OF CAUSES, 1.

**SAFE APPLIANCES.** See MASTER AND SERVANT, 1; MUNICIPAL CORPORATIONS, 6; NEGLIGENCE, 2.

**SAFE PLACE.** See MASTER AND SERVANT, 12.

**SALES.**

1. *Essentials of Valid Contract.*—A written contract of sale which contains within itself a description of the thing sold, by which it can be known or identified, of the price to be paid for it, of the party who sells it and the party who buys it, contains all the requisites of a valid written contract of sale. *Tidewater Railway Co. v. Hart*, 204.

2. *Conditional Sale—Insufficient Description of Property.*—A contract for the sale of specific personal property, reserving title thereto, which further provides for furnishing such "additional shafting, piping, connections, etc., as may be required to complete the said plant as to the motive power of the same," is too vague and indefinite in its description of the additional shafting, etc., to be supplied, to enable a stranger to identify the property with any degree of accuracy, and hence the title sought to be reserved cannot be protected as against a subsequent purchaser for value and without other notice thereof. *Monarch Laundry v. Westbrook*, 382.
3. *Reservation of Title—Code, Section 2462—"Goods and Chattels" "Movable" Property.*—The term "goods and chattels" used in section 2462 of the Code, relating to the reservation of title to personal property, is restricted to "visible, tangible and movable" personal property as distinguished from choses in action, but is not restricted to movable personal property of the same class to which a slave belonged. "Movable" means "that which may be lifted, carried, drawn, turned or conveyed, or in any way made to change its place or position." *Monarch Laundry v. Westbrook*, 382.
4. *Reservation of Title—Recordation—Code, Section 2462.*—A reservation of title to engines, boilers and machinery which a vendor, by a written contract, sells to a vendee, and installs for use in a plant for the conduct of a laundry business is valid as against subsequent purchasers of the plant from the vendee, or mortgagees thereof, where it appears that the contract reserving the title was duly docketed in accordance with the provisions of section 2462 of the Code prior to the sale or mortgage. The docketing or recordation of such a contract constitutes constructive notice thereof to third persons. Such was the object of the statute. *Monarch Laundry v. Westbrook*, 382.

#### SCHOOLS.

1. *State Board of Education—Selection of School Furniture—Constitutional Law.*—Sub-section six of section 1433 of the Code, as amended by an act approved March 15, 1906, confers the power upon, and makes it the duty of the State Board of Education to select the school furniture for use in all the public schools of the State, and is a valid enactment. There is nothing in section 136 or any other section of the Constitution of this State which, expressly or by necessary implication, prohibits the General Assembly from conferring such power on the State Board of Education. *Commonwealth v. School Board*, 346.
2. *Statutes—Constructions—State Board of Education "To Select" School Furniture—City Boards "To Provide."*—All statutes in

*pari materia* should be read and construed together as if they formed parts of the same statute, and were enacted at the same time; and where there is a discrepancy or disagreement between them, their different provisions, as far as possible, should be reconciled and such interpretation given as that all may stand together. Applying this rule of interpretation to sub-section six of section 1433 of the Code, as amended by an act approved March 15, 1906, directing the State Board of Education "to select" school furniture for all the public schools of the State, and sub-section ten of section 1538 of the Code, as amended by an act approved March 17, 1906, directing city school boards "to provide" suitable school furniture for their schools, the two acts are not necessarily in conflict, but may stand together. The terms "to select" and "to provide" are not synonymous, and it is not to be presumed that the General Assembly intended, by the latter act, to take away from the State Board of Education the power conferred upon it by the act approved only two days previously. The power conferred on the State Board is clear and explicit, and should not be taken away by any language or provision in the statutes less clear and explicit than that by which it was conferred. Looking to all the provisions of the Constitution and statutes on the subject, it appears that the power to select furniture for all the public schools of the State, including those in cities, was clearly vested in the State Board of Education, by a valid act of assembly, and has not been taken away from it by any subsequent act. *Commonwealth v. School Board*, 346.

**SECURITY.** See EXECUTORS AND ADMINISTRATORS, 2, 3.

**SEDUCTION.** See CRIMINAL LAW, 25.

**SEWERS.** See MUNICIPAL CORPORATIONS, 7, 8, 9.

**SIGNALS.** See MASTER AND SERVANT, 4: RAILROADS, 12, 13: WITNESSES, 7.

**SINKING FUND.** See CONSTITUTIONAL LAW, 6.

**SOCIAL CLUBS.** See INTOXICATING LIQUORS, 2.

**SPECIFIC PERFORMANCE.**

1. *Part Performance—Fraud.*—A court of equity will decree the specific performance of a written contract for the sale of real estate at the instance of a purchaser who has partly performed the contract under circumstances which affect the conscience

of the vendor, and where a failure on his part to carry out the contract would operate a fraud on the purchaser's rights. *Tide-water Railway Co. v. Hurt*, 204.

See CONTRACTS, 9.

SPEED. See STREET RAILWAYS, 6.

STANDING TREES. See TAXATION, 1, 2.

#### STARE DECISIS.

1. *Rule of Property—Sporadic Decision—Effect of Overruling.*—A sporadic decision, contrary to the weight of authority in the same jurisdiction, does not constitute a rule of property under the doctrine of *stare decisis*. The effect of overruling such a decision and refusing to abide by the precedent is retroactive, and makes the law at the time of the overruled decision as it is declared to be in the last decision. *Saffell v. Orr*, 768.

STATE BOARD OF EDUCATION. See SCHOOLS, 1, 2.

#### STATUTES.

1. *Code, 1904—Section Headings Not Law.*—The titles in black face type found at the head of the sections of the Code of 1904 were placed there for convenience by the compiler of the Code, and are no part of the statutes. *Ches. & O. R. Co. v. Paw*, 288.
2. *Constitutional Law—Statutes—Emergency—Dispensing with Reading—Sections 50 and 53 of Constitution.*—The emergency which makes it necessary for a law to take effect sooner than ninety days after the adjournment of the legislature is entirely different from the emergency which must exist in order to dispense with reading the bill on three different calendar days in each house. The first is provided for by section 53 of the Constitution, and by its express terms the emergency must be expressed in the body of the bill. The second is provided for by section 50 of the Constitution, and the emergency need not be expressed in the bill. This is also the legislative construction of these constitutional provisions. *Couk v. Skeen*, 6.
3. *Constitutional Law—Sufficiency of Title of Statute.*—If the subjects embraced in an act, but not specified in the title, have congruity or natural connection with the subject stated in the title, or are cognate and germane thereto, the requirement of the Constitution that "no law shall embrace more than one subject, which shall be expressed in its title," is satisfied. *Couk v. Skeen*, 6.

4. *Constitutional Law—Title of Statute—"Court-house"—"County Seat."*—The word "court-house" is used in this State as synonymous with "county seat," and the title of the act which uses one term is sufficient to cover the body of an act using the other. *Couk v. Skeen*, 6.
5. *Construction—Punctuation—Concealed Weapons—Case at Bar.*—Punctuation is not resorted to in the interpretation of statutes unless the intention of the legislature cannot be ascertained from the language of the statute (read in the light of legislation existing upon the subject when the statute to be interpreted was enacted), and of other statutes *in pari materia*. In the case at bar, it is not necessary to invoke the aid of punctuation. The statute concerning the carrying of concealed weapons, read in the light of its history, is sufficiently plain. *Withers' Case*, 837.
6. *Construction—Titles of Acts—Acts 1902-3-4*, pp. 388, 968.—The title of an act is frequently of value in the exposition of statutes, as a guide to the legislative intent, but there is nothing in the title of the acts under consideration (Acts 1902-3-4, pp. 388, 968) to divert the court from a meaning plainly to be gathered from the history of the legislation and in harmony with the manifest public policy of the State. *Ches. & O. R. Co. v. Pew*, 288.
7. *Foreign Statute—Construction—Presumption.*—Where a foreign statute which has received the construction of the State from which it comes, has been incorporated into the statute law of this State, it will be presumed that the legislature likewise adopted the construction placed upon the statute by the courts of the foreign State. *Ches. & O. R. Co. v. Pew*, 288.
8. *Interpretation of Writings—Words—Harmonizing Whole.*—In the interpretation of all writings words must be construed with reference to their plain and ordinary meaning, and, if possible, every word must be given its due force and effect, but at the same time each part of the writing must be construed with reference to every other part, so as to make it harmonious and sensible as a whole, if possible. *Willis v. Kalmbach*, 475.

See ACKNOWLEDGMENTS; CARRIERS, 4, 12, 13, 16; CONSTITUTIONAL LAW, 4, 7, 8, 9; CRIMINAL LAW, 5, 21, 25; INTOXICATING LIQUORS, 2; SCHOOLS, 2.

STOCKHOLDERS. See CONFLICT OF LAWS, 1; CORPORATIONS, 6, 8, 9, 11.

STREETS. See HIGHWAYS, 1; MUNICIPAL CORPORATIONS, 10, 11, 12.

STREET RAILWAYS.

1. *Contributory Negligence—Last Clear Chance.*—Notwithstanding the contributory negligence of a traveler in driving upon a



street car track in front of an approaching car, if the motorman of the car knew, or, in the exercise of ordinary care, ought to have known of the danger to which the plaintiff was exposed and could have avoided a collision by the exercise of ordinary care, but failed to do so, and the plaintiff was injured thereby, the street car company is liable. This is simply the doctrine of the last clear chance. *Norfolk & P. Co. v. Forrest*, 658.

2. *Contributory Negligence*—"Small Chance" of Injury—*Question for Jury*.—Whether or not it is contributory negligence for a person to attempt to cross a street railway track in front of an approaching car is determined by what a reasonably prudent person would have done under like circumstances, and is a question of fact to be determined by the jury. It cannot be said, as a matter of law, that to take a "small chance" of collision constitutes contributory negligence. *Norfolk & P. Co. v. Forrest*, 658.
3. *Excessive Speed*—*Lookout*.—Unless expressly permitted, the speed of a street car ought to be no greater than is reasonable and consistent with the customary use of the highway with safety; and it is the duty of a motorman operating such a car to keep a lookout for persons or vehicles on the highway. *Newport News, &c. R. Co. v. Nicolopoulos*, 165.
4. *Personal Injury*—*Contributory Negligence*—*Case at Bar*.—The evidence in the case at bar shows that the plaintiff, who was struck and injured by a street car at night, was perfectly familiar with all of his surroundings, including the street railway and its method of operation; that he was in a place of safety, with nothing to disturb his judgment, and with no duty imposed upon him, but that he stooped down to strike a match to signal a rapidly approaching car, at a point where it did not usually stop, with his head projecting over the rail, and, while in this position, was struck by the car. It thus appears that he, of his own volition, exposed himself to danger, and contributed to the injury which he received. The proximate cause of his injury was his own voluntary and negligent act, and hence there can be no recovery. *Norfolk & P. Traction Co. v. White*, 172.
5. *Persons on Track*—*Warnings*—*Personal Injury*—*Contributory Negligence*.—A traveller on a city street has a right, in order to avoid an obstruction in the street, to go on or near a street railway, and, unless a motorman whose car is approaching from the rear sees that his approach is observed, it is his duty to warn the traveler of the approach of the car, and, if there is danger of running the traveler down, to slow down his car so as to avoid injuring him, if he can do so in the exercise of ordinary care, after he sees or ought to see the traveler's peril.

If, in consequence of a disregard of this duty by the motorman, the traveler is injured, he may recover of the railway company, even although he was guilty of negligence in going on or near the track. *Norfolk & P. Co. v. O'Neill*, 670.

6. *Pleading—City Ordinance—Negligence—Evidence—Street Railways.*—If a city ordinance be the basis of an action, and its violation constitutes the negligence relied on for a recovery, it should be pleaded, but where such violation is not the "ground of negligence" relied on, as where the defendant is charged with running its cars on a city street at a reckless and dangerous rate of speed, the violation of the ordinance is admissible in evidence, without being pleaded, along with other facts and circumstances tending to establish the negligence alleged in the declaration. There is no more reason why the ordinance should be pleaded than any other fact or circumstance tending to establish the negligence alleged. *Norfolk & P. Co. v. Forrest*, 658.

See MASTER AND SERVANT, 13, 14; PLEADING, 6, 9.

SUICIDE. See INSURANCE, 1, 2.

SUPPORT. See CRIMINAL LAW, 10, 11, 12.

## TAXATION.

1. *Standing Trees—Assessment in 1905—Act of March 17, 1906—Vansant v. Com'lth.*—A valid assessment for the taxation of trees, separate and apart from the land on which they stand, regularly made in 1905 by assessors appointed and acting under sections 441 and 472 of the Code, as amended by Acts 1889-'90, p. 137, stands as the basis of taxation until the reassessment to be made in 1910, unless the legislature shall grant relief. The act of March 17, 1906, taking from commissioners of the revenue authority to assess standing timber trees separate and apart from the land did not affect the validity of a prior assessment regularly made by assessors. *Vansant v. Commonwealth*, 108 Va. 135 distinguished. *Commonwealth v. Camp Man. Co.*, 84.
2. *Standing Trees—Separate Assessment.*—The fact that the present Constitution requires the General Assembly to provide for the special and separate assessment of all coal and other mineral lands, and is silent as to any special assessment of standing timber, does not deprive the legislature of authority to make special assessments of standing timber. The legislature may authorize the assessment of standing trees as a part of the value of the land, or it may prescribe the method of valuation of land and the timber standing thereon separately, where the

timber is owned by one person and the land by another. *Commonwealth v. Camp Man. Co.*, 84.

3. *Tax Deed—Failure to Comply with Law—Collateral Attack.*—A tax deed which shows on its face that the law which authorized its execution has not been complied with is invalid, unless there has been such a long acquiescence and possession under it as to justify a presumption in its favor, and may be collaterally assailed. *Bowe v. Richmond*, 254.
4. *Tax Deed—Premature Purchase—Invalidity of Deed.*—A deed from a clerk conveying land purchased by the State for delinquent taxes to an applicant under section 666 of the Code, as amended, which appears to have been made within less than four months after service of notice of the application to purchase is invalid on its face. *Bowe v. Richmond*, 254.
5. *Tax Deed—Purchaser from State—Prepayment of City and State Taxes.*—Where land in the city of Richmond has been sold for city taxes and bid in by the city, but it has not perfected its title thereto, and the same land is subsequently sold for State taxes and knocked out to the Auditor of Public Accounts, the charter of the city and the provision of chapter 28 of the Code are to be considered together and made to harmonize as far as possible in determining the rights of an applicant to purchase from the State, and the liability of the land for unpaid city taxes. So considering them, it is clear that the applicant has no right to purchase without paying the taxes due on the land to the city as well as those due the State. *Bowe v. Richmond*, 254.
6. *Tax Deed—Statute of Limitations—Compliance with Sections 661 and 666 of Code.*—In order to claim the benefit of the limitation of time within which a tax deed may be assailed and other provisions of section 661 of the Code, relating to the purchase of lands delinquent for taxes, a purchaser under section 666 of the Code must comply with all the provisions of the latter section. *Bowe v. Richmond*, 254.

See CONSTITUTIONAL LAW, 10; ELECTIONS, 4, 5, 6.

#### TELEGRAPHS AND TELEPHONES.

1. *Interchange of Business—Rights of Patrons.*—A subscriber and patron of a telephone company may demand of that company the same service it renders to other patrons of that class, and none other, and of other companies the same service they accord to the public, and upon the same terms. He is in no sense a representative of the company in which he is a stockholder, and cannot dictate to that company or to other companies what physical connections they shall make, or what regulations, if

any, they shall adopt for the interchange of business. *Ivanhoe Fur. Co. v. Va. & Tenn. Tel. Co.*, 130.

See MANDAMUS, 2.

TIME. See CRIMINAL LAW, 11, 22, 23.

TITLE. See EMINENT DOMAIN, 4.

TITLE OF ACT. See STATUTES, 1, 6.

TORTS. See PLEADING, 7, 8.

TRANSPORTATION COMPANIES. See CARRIERS, 2.

#### TRIAL.

1. *Inferences from Conduct—Question for Jury.*—Where the evidence is conflicting it is for the jury to determine the weight to be attached to the inferences that could reasonably be drawn from the conduct of the parties. *Norfolk & P. Co. v. Forrest*, 658.
2. *Withdrawal of Evidence—Statements of Counsel.*—If, when a question is asked a witness, objection is made thereto, and the propounder withdraws it, saying: "We would rather withdraw the question than to give him any show of an appeal," the fact that such statement was made in the presence of the jury is not prejudicial to the objector. *Ches. & O. R. Co. v. Hoffman*, 44.

See DEMURRER TO EVIDENCE, 3; INSTRUCTIONS, 9; PLEADING, 2, 16.

#### TRUSTS AND TRUSTEES.

1. *Breach of Trust by Trustee—Removal—Case at Bar.*—The evidence in the case in judgment shows that the trustee in a deed of trust has been guilty of a breach of the trust reposed in him, has neglected his duty, and has totally disregarded the interest and welfare of the beneficiary under said deed, and hence was properly removed as trustee. *Hawley v. Watkins*, 122.
2. *Trustee's Interest Adverse to Beneficiary.*—A person who has an interest in a trust fund directly antagonistic to that of the beneficiary, or whose wife has such an interest, is not a proper person to act as trustee in the administration of such fund. *Hawley v. Watkins*, 122.

See APPEAL AND ERROR, 3; DEEDS, 5; DESCENTS AND DISTRIBUTIONS, 1; FRAUD, 4.

TURNTABLES. See MASTER AND SERVANT, 7.

UNDUE INFLUENCE. See WILLS, 8, 9.

UNITED STATES LICENSE. See CRIMINAL LAW, 23, 24.

UPSET BIDS. See JUDICIAL SALES, 1.

USAGE OF TRADE.

1. *Evidence—Usage of Trade to Fix Meaning of Contract.*—Parol evidence of a general usage of trade or universal custom may be received to fix and determine the meaning of words of a contract affected by such trade or usage which would be otherwise ambiguous. *Richmond v. Barry*, 274.

See CONTRACTS, 4; MUNICIPAL CORPORATIONS, 2.

VACATION ORDERS. See EQUITY, 9.

VENDOR AND PURCHASER.

1. *Changed Conditions—Disaffirming Contract—Action for Purchase Money.*—Where no possession of land was ever delivered by the vendor to the vendee, and the vendor has placed himself, or permitted himself to be placed, in such a position, without fault on the part of the vendee, that he cannot deliver the land sold in substantially the condition it was when the contract of purchase was entered into, he is really in no better condition than if the title to the property sold was bad; and a vendee who has paid a part, or the whole, of the purchase price, may elect to disaffirm the contract, and sue at law and recover the purchase money paid by him. *Riverside Co. v. Husted*, 688.
2. *Damages—Defective Title to Gas Well—Lease—Well Ceasing to Flow Pending Suit for Purchase Price—Supplemental Bill.*—In a suit to enforce the collection of the balance of purchase money for real property, a part of which consisted of a gas well, where it appears that the property was sold in fee, free from encumbrances, at a gross price, and that the complainant did not have title to the gas well, and in consequence thereof the defendant was compelled to lease the gas well, the fact that the well ceased to flow and was abandoned pending the suit may be set up by a supplemental bill, and the complainant is entitled to recover the balance of purchase money less such reasonable sums as were paid for the use of the gas well while it flowed. In the absence of fraud, where the outstanding title is acquired, or an incumbrance is removed, by purchase by a vendee in possession, such vendee is entitled to the amount reasonably and fairly paid by him on that account, and to no more. *Bibb v. American Coal Co.*, 261.

3. *Estimation of Quantity—Sale by Acre—Mistake—Case in Judgment.*—If a vendor sells to a purchaser a boundary of land "said to contain" seventy-five acres, at a gross sum, this statement, while not amounting to a positive affirmation of quantity, is a representation that the boundary contains that number of acres, and upon that representation the purchaser has the right to rely. If there is no other evidence of a sale in gross except the conflicting statements of parties equally entitled to credit, and there turns out to be a deficiency in the quantity, the purchaser is entitled to recover back the price paid for the deficiency. It is a case of mutual mistake. In the case in judgment, it does not clearly and cogently appear that the sale was in gross, and not by the acre. *Epes v. Saunders*, 99.
4. *Fraudulent Representation—Reliance on—Evidence of Non-Reliance.*—If the purchaser of property has not equal means of information with the seller, and he has the right to rely upon representations made by the seller with reference to the property, evidence to show that he did not rely upon said representations must be of the clearest and most satisfactory character. In such cases there ought to be no room for inference or mere implication. *Fitzgerald v. Frankel*, 603.
5. *Innocent Purchaser—Defects in Chain of Title—Decrees Against Infants—Right to Show Cause.*—Where a party purchases land which is subject to the right of another, and that right is shown by the chain of title papers, the purchaser is charged with notice of all that the title paper or papers to which they refer may disclose upon complete examination, and this notice affects subsequent purchasers from him. A purchaser from one whose title depends on a decree taken against an infant is charged with notice of the infant's right to show cause against the decree, and hence is not an innocent purchaser so far as the rights of the infant, asserted within the statutory period, are concerned. *Saffell v. Orr*, 768.
6. *Loss of Land—Recovery of Purchase Money—Cloud on Title—Case in Judgment.*—A purchaser of land with full notice of a prior deed of trust to secure money, bought the land for part cash and the residue on time, accepted a deed with covenants of general warranty and against encumbrances, and gave back a deed of trust to secure the deferred payments, and the trustee and the beneficiary and her husband agreed to apply the cash payment to the payment of the prior deed of trust debt, but failed to do so. Subsequently, the husband agreed to refund the cash payment and take back the land, but this was not done. The purchaser was informed that the amount due under the prior deed of trust was much less than his last bond, and could be paid out of its proceeds, but he declined to agree to

this, or to pay the instalment then due, and the land was afterwards sold for default in payment of the deferred payments and brought only enough to pay them. The purchaser at the trustee's sale brought ejectment against the former purchaser and turned him out, and this action was brought by the latter against the trustee, and the beneficiary and her husband above mentioned, to recover back the cash payment made on the land and damages for the "trouble, costs and damages in moving away."

*Held:* The purchaser could have paid the amount due on the former deed of trust and had the same credited on the amount due by him, or could have enjoined the sale until the prior debt was paid or so much of what he owed as was necessary was set apart for that purpose. Not having done this he cannot maintain the present action. The beneficiary is not liable, as the purchaser did not pay the prior lien, and the land brought no surplus, and he was not evicted by title paramount, and the trustee and husband are not liable as there was no consideration for their promise. *Savage v. Cauthorn*, 694.

7. *Sale by the Acre—Presumption.*—If parties enter into an agreement for the payment of a gross sum for a tract of land, upon an estimate of a given number of acres, there is a presumption that the quantity influences the price to be paid, and that it is a sale by the acre, and not a sale in gross, unless the contract plainly indicates a sale in gross, and this presumption can only be overcome by clear and cogent proof. *Epes v. Saunders*, 99.

8. *Sale on Installments—Action to Recover Payments.*—Where land has been sold to be paid for in installments, and the deed is not to be made until the last installment is paid, and a change in the condition of the land has been made or permitted by the vendor who still has possession, without the knowledge of the vendee, the vendor has until the last installment falls due to restore the land to substantially its original condition, if it can be so restored, and no action can be maintained by the vendee before that time to recover installments paid. *Riverside Co. v. Husted*, 688.

See SALES, 1.

## VERDICTS.

1. *Conflicting Evidence.*—The evidence in the case at bar is seriously in conflict as to whether an excavation in one of the streets of the city of Richmond into which the plaintiff fell and was injured, was properly lighted and barricaded at the time of the injury complained of, so as to warn the plaintiff of danger. The determination of this question was peculiarly the province

of the jury, and their verdict should not be set aside. *Richmond v. Poore*, 313.

2. *Excessive—Case at Bar.*—If, in an action against a county to recover for the value of goods furnished to persons in quarantine, it appears that fifteen persons were in quarantine, for only nine of whom the county was responsible, that no account was kept of the goods furnished or used by them, and it is not shown what any of them used, a verdict for the plaintiff for more than nine-fifteenths of the amount claimed as furnished to all of them will be set aside as excessive. *Louisa County v. Yancey*, 229.
3. *Proper Instructions—Sufficiency of Evidence.*—The verdict of a jury will not be set aside as contrary to the law and the evidence where it appears that the case was fairly submitted to the jury under proper instructions, and there was ample evidence to support the verdict. *City of Richmond v. Wood*, 75.

See APPEAL AND ERROR, 5, 19, 20, 21, 22, 23, 24; CRIMINAL LAW, 1, 26, 28; DAMAGES, 2; DEATH BY WRONGFUL ACT, 1; INSTRUCTIONS, 5; NEW TRIAL, 3; PLEADING, 13; WILLS, 9.

**VIEWS.** See CRIMINAL LAW, 27.

#### **WAIVER.**

1. *Contract—Estoppel.*—A waiver, to operate as such, must arise either by contract, or by estoppel. If by contract, it must be supported like any other contract, by a valuable consideration. If estoppel by conduct is relied on, the party sought to be estopped must have caused the other party to occupy a more disadvantageous position than he would have occupied but for that conduct. *Atlantic Coast Line v. Bryan*, 523.

See APPEAL AND ERROR, 16; CARRIERS, 15; EQUITY, 4; FRAUD, 1; RESCISSION, 1.

**WAREHOUSEMAN.** See CARRIERS, 5.

#### **WILLS.**

1. *Construction—Case in Judgment—Gift of Fee—Subsequent Diminution—Repugnancy.*—A testator, by one clause of his will, gave to his sister absolutely and in fee-simple certain property. In the next clause he says: Inasmuch as my said sister is mentally incapacitated from understanding or attending to business matters, I desire that the circuit court appoint a trustee to receive the said sum of money for the use and benefit of my said sister, the said money to be advanced to her



as she may need it. Should any of said sum of money be in the hands of said trustee at the death of my said sister, my desire is that the same be equally divided between X and Y.

*Held:* The sister takes full equitable ownership in the personality and an equitable fee in the real estate given in the first clause which is not cut down nor diminished by the second clause of the will. The limitation over is void for repugnancy. *Hawley v. Watkins*, 122.

2. *Construction—Case in Judgment—Gift to Class—Revocation as to One of Class.*—A testator devised all of his property to his wife for life, with remainder to the children of his brother and to his ward, share and share alike, and provided that in the event of the death of any of said children, leaving issue, then such issue should take the share of their deceased parent, and in the event of the death of his ward without issue, then the entire estate should go to his said brother's children. By a subsequent codicil he revoked the provision for the benefit of his ward. The brother left five children, all of whom were in being at the date of the will, but one of them died before the testator, leaving issue. It was claimed by the heirs and next of kin of the testator that he died intestate as to the share which would have gone to his ward, but for the codicil revoking the provision in her favor.

*Held:* The effect of the revocation of the gift to his ward by the codicil was to take her out of the class originally made by the will, and to leave the entire residuum to go to the children of the testator's brother who survived the testator, and the issue of the deceased child. *Saunders v. Saunders*, 191.

3. *Gift to a Class.*—A gift to a class is an aggregate sum to a body of persons uncertain in number at the time of the gift, to be ascertained at a future time, who are to take in equal or some other definite proportions; the share of each being dependent for its amount upon the ultimate number. *Saunders v. Saunders*, 191.
4. *Construction—Gift to a Class.*—Whether a devise or bequest is to a class or to the individuals constituting the class distributively is a question of intention, depending upon the language of the testator in making the gift. *Saunders v. Saunders*, 191.
5. *Gift to a Class—Failure as to One of Class.*—Where a gift is to a class and it falls as to one of the class, because of death, revocation or any other cause, the survivors of the class will take the whole. *Saunders v. Saunders*, 191.
6. *Devise for Life With Power to Consume Fee—Repugnancy.*—A devise and bequest by a husband to his wife of all his property to be used and enjoyed by her during her life or widowhood,

in such quantities as may be requisite for her comfortable maintenance, vests in the wife a fee-simple estate in the real property and an absolute estate in the personalty, and a limitation over to any one of any estate in the property so devised and bequeathed is void for repugnancy and uncertainty. *Rolley v. Rolley*, 449.

7. *Testamentary Capacity*.—A testator who is a clear headed business man, with ability to attend accurately and successfully to the affairs of life is not deficient in capacity to make a will, though he is seventy years of age and unable to read or write. *Wood v. Wood*, 470.
8. *Undue Influence—Duress—Burden of Proof—Case in Judgment*.—Before undue influence can be made the ground for setting aside a deed or will, it must be sufficient to destroy free agency on the part of the grantor or testator. It must amount to coercion, practically duress. It must be shown to the satisfaction of the court that the party had no free will, but stood *in vinculis*; and the burden of proof in such a case, as in a case where fraud is charged, is always on him who charges undue influence. In the case in judgment, there is no evidence of any specific act of undue influence exerted or attempted to be exerted over the testator by any one charged with being in a position to guide his judgment, but the acts proved are entirely consistent with innocence and purity on the part of all who are connected with them. *Wood v. Wood*, 470.
9. *Verdicts—Jury's View of What Testator Should Have Done*.—A jury is not justified, and will not be sustained, in setting aside the expressed intention of a testator because, in its judgment, a more equitable disposition of his property could have been made. *Wood v. Wood*, 470.

See DESCENTS AND DISTRIBUTIONS, 1: FEE-SIMPLE. 1.

#### WITNESSES.

1. *Credibility—Positive and Negative Statements*.—Where the statements of two witnesses, equally credible, conflict, the positive statements of one, corroborated by the attitude of the other with reference to the subject of controversy, should prevail over the mere negative statements of the other. *Miller v. Smith*, 651.
2. *Death of a Party to Contract—Agent or Survivor*.—The agent of a corporation contracting for his principal is not rendered incompetent to testify by reason of the death of the other contracting party. *Farmers Man. Co. v. Woodward*, 596.
3. *Evidence—Impeachment of Witness—Introduction of Part of a Paper—Exclusion of Other Parts in Rebuttal*.—Where a portion

of a defendant's answer in a chancery suit is introduced on his cross-examination as a party to an action at law for the purpose of impeaching him, by showing a prior inconsistent statement about the same matter, he cannot, on re-direct examination, put in evidence the whole answer, but only so much thereof as relates in some way to the statement proved. *Colby v. Reams*, 308.

4. *Impeachment—Admissions—Former Testimony.*—If a party to a suit testifies that he acquired his interest in the land in controversy in the suit by a deed from his father, and that he reconveyed the interest to his father, but delivered the deed to a third person in escrow, and that the latter delivered the deed to the father without the performance of the condition on which it was delivered, a former deposition given by such party in a suit between third persons touching the same land, in which he stated that the deed to him from his father was never delivered, and so never became operative and that he executed the reconveyance for the purpose of setting at rest any question that might arise by reason of the existence of the deed to him from his father, is admissible in evidence as an admission against his interest, and also for the purpose of discrediting him as a witness. *Nash v. Yellow Poplar Co.*, 14.
5. *Prior Inconsistent Statement of Witness—When Admissible.*—Prior inconsistent statements of a witness may be given in evidence to impeach his credibility, but for no other purpose. *Amer. Locomotive Co. v. Whitlock*, 238.
6. *Opinions—Matters of Observation—Experts—Minor Matters.*—A witness who was present and acquainted with the existing conditions may give his opinion as to how far, under those conditions, a signal given by a red lantern could have been observed on the occasion in question. This is not expert evidence, but a matter of common experience, the value of which is to be determined by the jury who have the witness before them and can judge of the value of his opinion. Such evidence should be received, but if rejected, is probably not of itself of sufficient importance to justify a reversal solely on that account. *New York, &c. R. Co. v. Wilson*, 754.
7. *Railroads—Signals—Experts—Opinions.*—A witness who has been in the railroad business for a number of years as brakeman and engineer may give his opinion as to the use of danger signals on railroads, the use made of them, the noises made by some, the light shed by others, and the like. *New York, &c. R. Co. v. Wilson*, 754.
8. *Statement of Motorman After Accident—Credit of Motorman as Witness.*—Statements made by a motorman after an accident

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in reference to the circumstances attending it, are admissible to affect the credibility of the motorman's testimony in the case, though not as an admission binding his company, and the jury should be so informed as to the latter by the court. *Norfolk & P. Co. v. O'Neill*, 670.

See APPEAL AND ERROR, 14; CRIMINAL LAW, 24; EVIDENCE, 11.

